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CASES

ON THE

Law of Insurance

SELECTED AND ANNOTATED

BY

Edward B. Evans,

Dean of Drake University College of Law,
Member of the Iowa Bar.

CHICAGO

T. H. FLOOD & CO.

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CASES ON LAW OF INSURANCE.

EDWARD B. EVANS.

CHAPTER I.

GENERAL PRINCIPLES.

SHAWE v. FELTON.

King's Bench, 1801. 2 East, 109.

Marine Valued Policy. Value of Cargo.

This was an action on a policy of insurance on the ship "Indian," and goods, valued at £66,000, on a voyage at and from Liverpool to the coast of Africa, during her stay and trade there, and from thence to her port or ports of discharge, sale, and final destination in the West Indies and America, and until she was moored twenty-four hours in safety. At the trial before Lord Kenyon, C. J., at the last Sittings at Guildhall, it was proved that the ship was seaworthy when she sailed from Liverpool; and it was not disputed that the insurers were interested in the ship and outfit (including provisions and sea-stores laid in for the slaves, which were to be taken in on the coast of Africa, and also wages advanced to the crew) to the extent of the value insured. The ship arrived on the coast of Africa, took in a cargo of slaves there, and proceeded to Demerara. In the course of her voyage thither, and in calm weather, she met with a violent concussion, described to resemble an earthquake, from which she received so much damage that it was with the greatest difficulty she was kept afloat by pumping until she reached Demerara, almost a wreck, where she was obliged to be lashed alongside of a hulk to keep her from sinking; in attempting to remove her from thence to the shore, a few days afterwards, she sunk, although the distance was only about fifty yards. At

the time of her arrival at Demerara her stores were considerably expended. The ship was originally destined there, in the first instance, with directions to the captain to proceed to other ports and places in case he could not dispose of the slaves there at a certain average price. And his letter of instructions from his owners contained the following direction: "As your vessel is not according to the late act of Parliament, we would have you sell her in the West Indies, provided you can procure £1,200, but expect you will get from £1,500 to £1,200. Should you not dispose of her, you will procure what freight you can for Liverpool." In fact, the vessel having been surveyed at Demerara, and condemned as unserviceable, was sold only for £388. In consequence of this, the captain was obliged to dispose of all the slaves there, not indeed so advantageously as he might otherwise have done had be been enabled to proceed to other places, but still so as to cover the average price to which he was limited by his instructions. The plaintiff gave notice of abandonment to the underwriters, and recovered as for a total loss on the ship; and the verdict was taken for the full amount of the sum insured, it being a valued policy.

A rule was obtained calling on the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the grounds that the subject matter of the insurance was so much reduced from the original value at the time of the loss (if it were to be considered as a total loss), that the sum valued in the policy ought not to conclude the underwriter. That a policy, though valued, was still no more than a contract of indemnity, and was only meant to bind the parties when the subject-matter continued nearly in the same state as at first, allowing for usual wear and tear. That in particular it ought not to conclude in this case; because not only the actual worth of the ship was by the owner's own confession of so much less than the stipulated value, but also the stores which were included in the insurance were profitably expended by him in the purchase and sustenance of the slaves, all of whom had been brought to an advantageous market; and therefore, so far from the plaintiff having incurred any loss in this respect for which he was entitled to an indemnity, he was in fact a considerable gainer by the adventure.

Lord Kenyon, C. J. The jury had no doubt but that the ship was seaworthy when she sailed, and that there was a total loss; for though she arrived at Demerara, she was never moored twenty-four hours, nor a moment in safety. She came there a perfect wreck, having received her death's wound at sea, and was with the utmost difficulty kept afloat till all the people on board were landed. It is not pretended now that there was any fraud in the case; but it is contended that the underwriter is not bound by the valuation in the policy. It is of little consequence to inquire what my opinion would have been upon the subject of valued policies in the year 1746, immediately after the Stat. of the 19 Geo. II passed: for very soon after they were decided to be legal by as cautious and upright and painstaking a judge as ever presided in this court (Lord C. J. LEE). He was succeeded by Sir Dudley Ryder, and this latter by Lord Mansfield; and during all this period such policies have been sanctioned by one uniform course of decisions. All this is now supposed to be wrong; and the rules by which this and other commercial nations have so long regulated their dealings is now wished to be disturbed; but I will not lend my aid to open such a new and wide door of litigation, much exceeding everything that has gone before. If we were to enter into the calculations which have been contended for, every valued policy would have to be opened. Every man's meal on board a ship would take from the value of the original outfit. Is this to be endured? Will good faith admit of it? Where is the line to be drawn between a greater or less diminution of the value? Therefore as the rule and practice of valued policies have been acted upon and sanctioned since the passing of the statute; I am not one who wish quieta movere.

Grose, J. We are desired by this motion to open a valued policy, contrary to the practice, and in a case where no fraud is imputed; for doing which no authority has been cited. If we were to admit it in this instance, it would be required in every other; and thus a door would be opened to endless litigation. Therefore, to avoid great injustice to individuals, and great public inconvenience, I think we are bound to refuse the application.

Lawrence, J. As the practice of binding parties as to the amount of their interest by valued policies has obtained ever since that Stat. of Geo. II., it would require very strong reasons to show that it is wrong. That statute was passed to prohibit mere wagering policies by persons insuring who had no interest in the thing insured, and therefore it avoids policies made, interest or no interest, or without further proof of interest than the policy itself. The effect therefore of a valued policy is not to conclude the underwriter from showing that the assured had no interest, and that in fact it was a mere wagering policy within the statute; but in order to avoid disputes as to the quantum of the assured's interest, the parties agree that it shall be estimated at a certain value. Here it is not pretended that the subject matter of the insurance was not at first of the value estimated in the policy. Then how does this differ from the case of an open policy in this respect? Would it not be sufficient for the assured in an open policy to prove that at the time the ship sailed the subject-matter of the insurance was of such a value? Is not that the period to look to, and not the state of the thing at the time of the total loss happening? If on account of the peculiar nature of an African voyage there ought to be a difference in this respect between these and other trading adventures, the underwriters may, if they please, introduce a special clause in the policy to provide for the diminution in value by the expenditure of stores and provisions in the purchase and sustaining of the slaves. As it stands at present, there appears no ground for making any such distinction.

Le Blanc, J. The present is an extreme case, because the loss happened at the last period of the voyage at which it could happen. But the same thing must occur more or less in every policy upon ship and outfit. The value of the property must be continually diminishing, and if the loss happen at the latter end of a long voyage, no doubt the property must be considerably deteriorated at the time by the usual wear and tear; and yet it is never objected that the underwriter is not liable for the original value. As to the owner himself having estimated the value of the property at so much less than the sum at which it was insured, many things may happen to render

a vessel of less value when the voyage is concluded, although the subject-matter exists; the amount of the repairs required, etc. The rule having been so long laid down as to valued policies, it is too late to open it again. Rule discharged.

SMITH v. SCOTT.

Common Pleas, 1811. 4 Taunt, 126.

The Risk Assumed.

This was an action upon a policy of insurance upon the ships "Helena" and "Merlin" at and from the bay of Honduras to their port or ports of discharge in Great Britain, and a loss was averred to have happened to the "Helena" by circumstance, that, while she was proceeding on her voyage, a certain other ship on the high seas, by and through the force of the winds and waves, was carried and sailed against the "Helena," without any neglect or default of the persons on board the "Helena," and the "Helena" became lost and stranded by the perils of the seas. Upon the trial of the cause, at the London sittings, after Trinity term, 1811, before Mansfield, C. J.. the evidence was, that a ship named the "Margaret" ran foul of the "Helena" by the grossest neglect; for when, upon the shock being given, some of the "Helena's" crew went on board the "Margaret" they found only one man on the deck, and he was asleep. Hereupon it was objected by the counsel for the defendant, that the occasion of the injury was not the perils of the seas, but the gross negligence of the crew of the "Margaret," and that this was a fatal variance from the loss averred. The jury, however, found a verdict for the plaintiff, subject to this point, which the chief justice reserved.

Accordingly, Lens, Serjt., on this day moved for a rule nisi to set aside the verdict and enter a nonsuit, adding that the plaintiff had his remedy against the owners of the "Margaret."

Mansfield, C. J. I do not know how to make this out not

to be a peril of the sea. What drove the "Margaret" against the "Helena?" The sea! What was the cause that the crew of the "Margaret" did not prevent her from running against the other, their gross and culpable negligence? But still the sea did the mischief. It is reasonable enough that the plaintiffs should permit the defendant to use their names as plaintiffs against the owners or crew of the "Margaret" so as to recover whatever the plaintiffs would be entitled to as against the "Margaret," and to apply it in diminution of their loss; but it would lead to endless discussion, if it were required that no cause except the cause of loss alleged in the declaration should be conducive to the loss.

Heath, J. If this doctrine were to prevail, it might go still further, and it might be contended that, if a master conducts his ship so unskilfully as to run it on a rock, that is not a peril of the sea, but a peril of the unskillfulness of the master.

Rule refused.

SUN INSURANCE OFFICE OF LONDON v. MERZ.

Supreme Court of New Jersey. 1899. 63 N. J. 365.

Lloyds. Reinsurance. Insurable Interest.

Magie C. J. The questions argued in this case arise on a demurrer to the first and second counts of plaintiff's declaration. Each of these counts is founded upon a contract, which is referred to therein, and annexed to the declaration. It will be convenient to consider the contract, which, being so referred to and annexed, cures any defects by reason of not setting forth, or insufficiently setting forth, the same in the body of the declaration. The contract purports to be executed on Oct. 13, 1897, by the defendant and 24 other persons and firms. Its pertinent provisions are the following: "We, the undersigned, firms and individuals, as separate underwriters, each represented by and acting through Thomas & Bellows, of the city of Jersey City, hereinafter called the 'attorneys,' and each

firm or individual acting separately, and not one for the other or for any of the others, do hereby agree to insure the separate amounts placed after our names, respectively, in consideration of stipulations herein named, and of the payment to and receipt by us of our respective proportions of the sum of three thousand dollars as premium of such insurance, and do hereby separately in the said amounts reinsure the Sun Insurance Office of London for the term of time from the 30th day of September, 1897, at midnight, to the 31st day of December, 1897, at midnight, against all direct loss or damage by fire to the property herein mentioned, except as hereinafter provided, to an amount not exceeding in the aggregate the sum of $25,000, nor exceeding the interest of the insured in said property, to the following described property, while located and contained as described herein and not elsewhere, to wit, reinsurance of the Sun Insurance Office of London. Being a reinsurance of the liability of the Sun Insurance Office for claims for loss and damage by fire or lightning occurring in the months of October, November, and December, 1897, destroying and damaging property located anywhere in the United States and territories. First: The property must be damaged or destroyed by fire between midnight of September 30th, 1897, and midnight of December 31st, 1897. Property damaged prior to midnight of September 30th, 1897, or after midnight of December 31st, 1897, is not reinsured or covered by this policy. Second. No claim for loss can be made upon the New Jersey State Fire Association until the Sun Insurance Office of London presents a statement, under oath, that they have suffered and paid losses by and in consequence of fires occurring during the time between midnight of September 30th, 1897, and midnight of December 31st, 1897, equal to the sum of $172,500, net,—after salvages and all reinsurance applicable thereto have been allowed." The present action against the defendant is supported by virtue of the following provision of the contract: "In the event of litigation herein, to avoid a multiplicity of suits, no suit or other proceeding at law or equity shall, in any event, be begun or maintained for the recovery of any claim upon, under, or by virtue of this policy against more than one of the underwriters hereon at any

time, nor in any court other than the highest court of original jurisdiction; and a final decision in such suit or other proceedings shall be taken to be decisive of the similar claim, so far as the same may subsist, against each of the other underwriters hereon, absolutely fixing his liability in the premises. Each of the underwriters hereon, in consideration of their entire stipulation, so far as he individually is or may be concerned, expressly agrees to accept and abide by the result of such final decision, in the manner and to the same effect as if he had been sole defendant in a similar suit or proceeding as to the similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements. And the attorneys are hereby authorized, as to each underwriter hereon, to receive and admit service of process of any suit or other proceeding begun or maintained as aforesaid."

It is first contended in support of this demurrer that this contract is one not authorized, but prohibited, by the laws of this state. This contention is based on the provisions of the act entitled "An act to permit and allow firms and individuals, not less than twenty in number, under each organization known as Fire Lloyds, to insure others against loss or damage by fire and lightning and to underwrite policies of insurance issued therefor under the Lloyds form," approved March 25, 1895 (2 Gen. St. p. 1784), as amended by the act entitled "An act to amend an act entitled 'An act to permit and allow firms and individuals not less than twenty in number under each organization known as Fire Lloyds, to insure others against loss or damage by fire and lightning and to underwrite policies of insurance issued therefor under the Lloyds form, approved March 25, one thousand eight hundred and ninety-five,' and to prohibit the transaction of the business of insurance in this state by individuals except as provided in said act," approved March 26, 1896 (Laws 1896, p. 156). It will be observed that this contention involves the question of whether individual underwriters, acting either singly or in association, require legislative sanction for carrying on the business of insuring property against fire, when they neither seek nor obtain corporate existence or powers for that purpose, and whether

the legislature may lawfully prohibit the carrying on of such business by individuals by themselves or in association,—questions which were mooted, but not decided, in this court, in Schenck v. State, 60 N. J. Law, 381, 37 Atl. 724. It is deemed unnecessary to discuss those questions, for they have not been argued; and we think that, if legislative authority to make this contract was required, it can be found in the legislation referred to, and we do not find any prohibition of such a contract therein. The contention in respect to authority to make the contract in question is based upon the two acts above referred to, which purport to make it lawful for Lloyds associations, such as this is, to insure property against direct loss or damage by fire or lightning. The plain construction of this grant is that it confers authority to insure against loss or damage occurring by fire or lightning, in favor, not only of the owners of property, but also of all having any insurable interest therein. It is well settled that an insurer of property acquires by his contract an insurable interest therein, which he may protect by a contract indemnifying him in whole or in part, which contract, although it is called "reinsurance," has the qualities and incidents of a contract of insurance. Easton R. Co. v. Relief Fire Ins. Co., 98 Mass. 420; Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co., 145 Mass. 419, 14 N. E. 632; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. 359; Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176; Wood, Fire Ins. § 262. Such being the construction of the authority granted by the acts in question, the provisions prohibiting insurance not thereby authorized do not make a contract of reinsurance unlawful.

The next contention is that the contract in question is wholly void, because it stipulates for the indemnity of the company against losses upon property in which it had no insurable interest. This contention is put on the ground that the contract, which is dated October 13, 1897, reinsures the liability of the company for loss and damage by fire and lightning in the months of October, November, and December of that year, without any limitation to such loss and damage as occurred upon policies which on October 13, 1897, the company had written and become liable upon. Obviously, by the language

of the contract the underwriters undertake to indemnify the company with respect, not only to losses on policies existing at its date, but also with respect to policies which it should thereafter write. As has been seen, the right to procure contracts of reinsurance is grounded upon the insurable interest arising out of the original contract of insurance. Before the latter contract comes into existence, the insurer has no insurable interest in the property. In this court it seems settled that a contract insuring the life of a person may be supported in favor of one who has no insurable interest in that life. Trenton Mut. Life & Fire Ins. Co. v. Johnson, 24 N. J. Law, 576; Vivar v. Knights of Pythias, 52 N. J. Law, 469, 20 Atl. 36. This doctrine has never been discussed in the court of errors. Meyers v. Schumann, 54 N. J. Eq. 414, 34 Atl. 1066. But this court recognizes a distinction between such a contract and a contract insuring against loss by fire, and has declared that the latter is a contract which requires an insurable interest in the property to give it validity. Martin v. Insurance Co., 38 N. J. Law, 142. A contract to insure property against loss by fire in favor of one having no insurable interest therein is a wagering contract, and void, as against public policy. Wood, Fire Ins. § 250. With respect, therefore, to the indemnity against loss, during the period named, against insurance policies written by the company after the issuing of this policy, this contract is void. The general rule in respect to insurance contracts which are invalid in part is that if the consideration is single, and the contract entire and not separable, the whole contract is void. Wood, Fire Ins. § 152. This rule is plainly applicable to the contract in question, and it results that the demurrer is well taken to these counts founded thereon. Demurrant is entitled to judgment.

Note: In Boston Ins. Co. v. Globe Fire Ins. Co. 174 Mass. 229:—it was held that in marine insurance the contract of reinsurance could legally include risks to be thereafter assumed by the insuring company.

HOUSTON DIRECT NAV. CO. v. INSURANCE CO. OF NORTH AMERICA.

Court of Civil Appeals of Texas. 1895. 31 S. W. 560.

Interstate Commerce. Freight Destroyed by Fire. Subrogation.

Williams, J. Appellee, having paid to the owners upon policies issued by it the value of cotton destroyed or damaged by fire while in the custody of appellant as a common carrier, brought this suit to recover of the appellant the amount of the loss thus sustained. Defendant pleaded the general denial, and further answered, in effect, that it is not liable, for the reason that the fire was not due to its negligence, nor to its design or neglect; that the cotton was an element of interstate commerce, and that sections 4282-4289 of the Revised Statutes of the United States are solely applicable to the contract of carriage, and to the regulation of the rights, duties, and liabilities of the defendant company; that the contracts for the transportation of the cotton are maritime contracts, concerning the transportation of freight upon the navigable waters of the United States connecting with the high seas; that the barge Katinka, on which the cotton was when burned, was a vessel duly enrolled and licensed for engaging in commerce and carrying on the coasting trade under and in pursuance of the statutes of the United States; that the loss was occasioned by fire not due to the negligence nor to the design or neglect of the defendant company; and that it is not liable to answer therefor.

The facts appearing and found by the court below are thus stated by counsel for appellant:

"The Houston Direct Navigation Company, defendant below, is a corporation created by a special act of the legislature of the state of Texas, passed and approved October 9, 1866. Sections 4 and 10 of said special act are in terms as follows:

" 'Sec. 4. That said company is vested with authority to improve the navigation of Buffalo Bayou by widening and deepening the same, and to remove, by dredging or otherwise, navigation over Red Fish Bar, and over any other bars between

the mouth of Buffalo Bayou and Galveston Harbor; provided, however, that nothing herein contained shall be construed to grant said company exclusive right to navigate and improve any of said waters; and provided, further, that the improvement of the navigation of said waters shall be, at all times, subject to the control and direction of such state engineer as may be hereafter appointed.'

"'Sec. 10. That the company shall, within six months after the passage of this charter, through the legislature, have on the waters of Buffalo Bayou and of Galveston Bay and Harbor a sufficient number of steamers, barges and propellers to meet the demands of commerce upon said company, and they shall be subject in the transportation of freight to the laws applicable to common carriers.'

"The defendant company was organized under said act, and has operated thereunder ever since, and also under license obtained from the United States, running and navigating steamers, barges, and propellers on the waters of Buffalo Bayou and Galveston Bay between the city of Houston and the city of Galveston, and seagoing vessels, for the purpose of transporting freight. During the month of September, 1892, the defendant company owned, operated and navigated upon said waters the barge Katinka, of fifteen tons' burthen. On the 15th of September, 1892, the defendant company received at Houston, Texas, 184 bales of cotton; and on the 16th of September, 1892, the defendant company received at Houston, Texas, 154 bales of cotton, giving bills of lading therefor. The bills of lading, among other things, recited that the cotton was 'received by the Houston Direct Navigation Company, in apparent good order and well conditioned, of Ziegler & McIlhenny, for delivery to order notify John Sherwood & Co. and O. Heyworth [respectively], or their assigns, at Galveston, he or they paying freight or charges, as per margin.' The bills of lading further provided: 'It is understood and expressly stipulated that the liability of the Houston Direct Navigation Company shall cease upon delivery to the next connecting line, and that the said Houston Direct Navigation Company and its connections, which receive and transport the said property, shall not be liable for loss by fire. * * * The cotton under

this bill of lading * * * is to be transported to the depots or the landings of the steamboats or forwarding lines at the points receipted to for delivery. It is further agreed that, in case of any loss or damage * * * that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss. This contract is executed and accomplished and the liability of the Houston Direct Navigation Company terminates on the delivery of the cotton to the Mallory Line at Galveston, when the liability of the said Mallory Line commences, and not before. [Signed] L. Megget, Agent, Severally, but not Jointly.' The cotton shipped to order notify John Sherwood & Co. was the property of John Sherwood & Co.; and, of the cotton shipped to order notify O. Heyworth, 154 bales were the property of C. Menelas; and said owners, at the time of the delivery of the cotton to the defendant company at Houston for transportation, insured the same for its full value, under open policies with the plaintiff company, against loss or damage by fire or any marine risk, paying the usual premium. All of said cotton was loaded on the barge Katinka, and at the time of said loading the defendant company received its local charges for the transportation of the cotton from Houston to Galveston; and the wharfage to accrue at Galveston on said cotton was also prepaid to the defendant company. On the 19th of September, after 172 bales of cotton had been unloaded from the Katinka at one of the wharves at Galveston, a fire broke out in the balance of the cargo yet on board the barge, destroying part thereof, and damaging the balance. The plaintiff company, under the terms of its policies, was compelled to take the damaged cotton and to pay the full amount of the insurance on the cotton so burnt, amounting, in the aggregate, to the sum of $6,729.33. Thereafter the plaintiff company sold the damaged cotton in open market to the highest bidder, sustaining a loss of $1,643.78, being the value of the burnt cotton, and the difference between the value of the damaged cotton before it was damaged and the amount realized from the sale. The plaintiff company claims to be subrogated to the rights of the owners of the cotton against the defendant company for the payment of the loss, which was declined. The

Mallory Line is a line of steamers running from Galveston to New York, at which place it connects with a line of steamers running thence to Liverpool. The owners of the cotton resided abroad, and it was the intention of the shippers, when the cotton was delivered to appellant, at Houston, that it should be carried by appellant to Galveston, and there delivered to the Mallory Line, and that it should be carried by that line to New York, and by other steamers thence to Liverpool."

The court below found the facts substantially as stated, and held that, under the bills of lading, the shipment from Houston to Galveston was not interstate or foreign, but merely domestic; that appellant, in carrying the cotton, was not engaged in interstate or foreign commerce; that its liability was not governed by the maritime law of the United States, but by its charter and the statutes of this state defining the liability of common carriers; that the provision in the bills of lading, exempting it from liability for loss from fire, was void, as contrary to such statute; and that hence it was immaterial whether or not the loss occurred through negligence or design of appellant.

CONCLUSIONS OF LAW.

1. We agree with the court below in holding that the law of this state fixing the liability of common carriers applies to this case. Houston and Galveston are points in the same state, and the line of transit from one point to the other lies wholly within its territory. The contract of defendant did not bind it to carry the cotton beyond the limits of the state. Though the owners of the cotton intended, when they commenced the shipment, to carry the cotton out of the state, it was only by the means of other carriers and other contracts of shipment that they could do so. The defendant was only an instrument by which they could transport the cotton to a point within the state, from which they could arrange for its transportation out of the state. Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475; Railway Co. v. Illinois, 118 U. S. 564, 7 Sup. Ct. 4; Railway Co. v. Cross, 5 Tex. Civ. App. 460, 23 S. W. 529. In the last case cited, a writ of error was refused by the supreme court. Unless

therefore, there is some other reason why the statute of this state cannot control, it follows that it fixes the liability of the defendant, and makes it liable for the destruction of the cotton, notwithstanding the stipulations in the bills of lading. Rev. St. arts. 277, 278.

2. The maritime law of the United States extends to and governs the navigation of Galveston Bay, and probably of Buffalo Bayou. By article 4282 of the Revised Statutes of the United States, it is provided: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason of or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." The act of March 3, 1851, which first adopted this rule, excluded from its benefits "the owners of any canal boat, barge or lighter or any vessel of any description whatsoever used in rivers or inland navigation"; but by an amendatory act of June 19, 1886, the provision is made to apply "to all vessels used on lakes and rivers or inland navigation, including canal boats, barges and lighters." This provision as construed and applied by the supreme court of the United States, forms a part of the maritime code, and prevails upon all the navigable waters of the United States, as such waters have been defined by that court. In re Garnett, 141 U. S. 1, 11 Sup. Ct. 840; Jackson v. The Magnolia, 20 How. 296; Nelson v. Leland, 22 How. 48; The Daniel Ball, 10 Wall. 557. The navigable waters, subject to the jurisdiction of the United States, the navigation of which is regulated by its maritime laws, include not only the seas, bays, inlets, and the great lakes, but all navigable streams emptying into them and forming with them highways of trade. The liability of the owners of ships navigating such waters for losses, such as that involved in this case, would ordinarily, it must be conceded, be regulated by the national law upon the subject, as that law is declared by the supreme court of the United States. But in the present instance the defendant is a corporation created by the state, deriving all its powers from the charter given to it by the state, and conducting its business subject to the liabilities and

burdens imposed by such charter. In creating it, the state could impose upon its existence and operations such conditions as the legislature thought proper. In accepting its charter the corporation assented to those conditions, and the charter constitutes the contract between it and the state. At the time the charter was given, there was no such law of congress, or rule of maritime law recognized in this country, as that above quoted, applicable to shipowners such as appellant; and the provision in the charter that it should be subject to the laws applicable to common carriers conflicted with no national law. The act of congress was subsequently amended, as shown above; but still it seems to us there is no necessary conflict between the act and this provision of appellant's charter, even if such a conflict would free the corporation from the latter. The provisions of the limited liability act of congress were intended to encourage navigation by lessening the risks incurred by those investing their means in ships to be controlled by others, but its benefits were not forced upon them against their will. When the state and the corporation, by the charter in question, agreed that the latter should be subject, in the exercise of the power conferred, to the liabilities imposed by the laws of the state, we cannot see how that interfered either with the letter or the policy of the laws of the United States. We have carefully examined the many authorities cited by appellant, and none of them, as we understand them, go to the extent of holding that the rule established by congress for shipowners generally would, in the case of a corporation, navigating entirely within the territorial limits of the state, supplant and destroy the provisions of the charter by which such corporation was created, and the law of its existence prescribed. The rule as to the power of the state in prescribing conditions on which its corporations shall do business is well recognized. Railway Co. v. Mackey, 127 U. S. 209, 8 Sup. Ct. 1161; Railway Co. v. Illinois, 118 U. S. 586, 7 Sup. Ct. 4.

3. The provision of the charter of defendant that its vessels should be subject to the law applicable to common carriers refers to the laws of the state. We think it meant more than to say simply that defendant should be a common carrier. The business in which the corporation proposed to engage would

have made it that, and the provision in the charter, with only such meaning, would have been useless.

The state at that time had a statute determining what the liabilities of common carriers should be, and, in our opinion, it was to such law the charter had reference.

4. Upon payment of the policies, the appellee was subrogated to rights of the owners of the cotton, and the judgment in its favor was correct. Liverpool & G. W. Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, 9 Sup. Ct. 469. The judgment is affirmed.

Note. Where an insurance company has paid a loss, and where the property was destroyed by the actionable negligence of a third party, the insurer stands in the relation of surety to the tort feasor and is subrogated to the rights of the insured. Chicago & A. R. Co. v. Glenny,—175 Ill. 238, 51 N. E. 896.

Note. Where the owner of property destroyed by the wrongful act of a third party under such circumstances as would enable the owner to recover, and the insurer pays the owner the amount of the loss to the extent of the payment the insurer is subrogated to the rights of the owner. Phoenix Ins. Co. v. Penn. R. R. Co. 134 Ind. 215,—33 N. E. 970. Atchison T. & S. F. R. Co. v. Home Ins. Co. 59 Kan. 432, 53 Pa. 459.

CASTELLAIN v. PRESTON.

Court of Appeal, 1883. 11 Q. B. D. 380.

Indemnity.

Appeal of the plaintiff from the judgment of Chitty, J., in favor of the defendants. The facts are fully stated in the report of the proceedings before Chitty, J. (8 Q. B. D. 613), and it is necessaary here only to briefly recapitulate them.

The plaintiff sued on behalf of the London, Liverpool, and Globe Insurance Company to recover a sum of £330, with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings

against loss by fire, and they kept the policy on foot by payment of the premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of £3,100, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August, in the same year, a fire occurred damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at £330, and that sum was, in fact, paid on the 25th of September, 1878, by the insurers, who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase-money paid.

The present action was commenced on the 31st of October, 1881.

Brett, L. J. In this case the action is brought by the plaintiff, as representing an insurance company, against the defendants in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly at all events of a house, and the defendants had made a contract of sale of that property with third persons, which contract, upon the giving of a certain notice as to the time of payment, would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and, according to the peculiarity of such a sale and purchase of land or real property, the vendees would have to pay the purchase-money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not

suggested that upon the house being burnt down the defendants had not an insurable interest. They had had an insurab'e interest, as it seems to me,—first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract; and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire, the defendants made a claim on the insurance company represented by the p'aintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants and the third persons, the vendees of the property. was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances, the plaintiff representing the insurance company brings this action. I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before Chitty, J., and he, in a very careful and elaborate judgment (8 Q. B. D. 613, at p. 615), has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire po'icy is a contract of indemnity and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall

never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

In the course of this discussion many propositions and rules well known in insurance law have been glanced at. For instance, to speak of marine insurance, the doctrine of a constructive total loss originated solely to carry out the fundamental rule which I have mentioned. It was a doctrine introduced for the benefit of the assured; for, as a matter of business, a constructive total loss is equivalent to an actual total loss; and if a constructive total loss could not be treated as an actual loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favor of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term. I may point out that the doctrine of notice of abandonment is most difficult to justify upon principle; it was introduced rather as a matter of justice in favor of the underwriters, so as to prevent the assured from obtaining by fraud more than a full indemnity. That doctrine is to a certain extent technical; that is to say, although the assured has in reality suffered a constructive total loss, and although he is upon general principles entitled to recover, nevertheless he must fail unless he has given a notice of abandonment. I suppose that the doctrine of notice of abandonment was originally introduced by merchants and underwriters, and afterwards adopted as part of the law as to marine insurance; but at first sight it seems a mere encroachment of the judges.

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been

adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favor of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties; but that, again, is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that it will, in certain cases, enable the assured to recover more than a full indemnity? The moment it can be shown that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used; that is to say, the insurer must be placed in the position of the assured. Now, it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether

by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that limit. In Burnand v. Rodocanachi, the foundation of the judgment, to my mind, was, that what was paid by the United States government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English government by way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own government to himself; but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English government invariably made the "gift," so invariably, that as a matter of business, it had come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shows that, in my opinion, it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner if upon the happening of a tort the tort is immediately made good by the tort feasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for a moment

exist a right of action in favor of the assured into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as between the assured and the insurer by reason of the satisfaction of that right. I fail to see at present if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned Brother, who knows much more of the law as to specific performance than I do, is, at all events, not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage therefore of that right, and by that right, not by a gift, which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right, which was at one time merely in contract, but which was afterwards fulfilled either when it was in contract only, or after it was fulfilled, does affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavored to enunciate, I think it due to Chitty, J., to

point out what passages in his judgment require some modification (8 Q. B. D. at p. 617). I find him reading this passage: "I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." That is a quotation from Lord Cairns, in Simpson v. Thomson. The learned judge then goes on: "What is the principle of subrogation? On payment the insurers are entitled to enforce all the remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this: "And if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant," I would add this,—"and if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of Burnard v. Rodocanachi, the learned judge cites the opinion of Bramwell, L. J. (8 Q. B. D. at p. 618). He says that Bramwell, L. J., in his judgment, held that it was not salvage, but " that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason, "because there was no right in the assured to demand the compensation from the American government." There was no right to demand it; it was bestowed and received as a pure gift. Darrell v. Tibbitts seems to me to be entirely in favor of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems

to me that in Darrell v. Tibbitts the insurers were nct subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage, "The doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the assured has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right over the thing insured which is not affected by the loss or safety of it, and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss. I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned Brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term" (8 Q. B. D. at p. 625). There I agree with him, only my view of the full sense is larger than that which he adopted. "And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way,—"which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it, —"which entitled the assured to be put by such third parties into as good

a position as if the damage insured against had not happened." The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and laboring clause under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of Darrell v. Tibbitts has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.

TRADERS' INS. CO. ET AL. v. RACE.

Supreme Court of Illinois. June 1892. 142 Ill. 338.

Insurance Payable to Mortgagee. Subrogation.

On rehearing.

The other facts fully appear in the following statement by the court:

August 28, 1882, appellants, the Traders' Insurance Company and the Agricultural Insurance Company of Watertown, N. Y., issued their several policies of insurance on a frame dwelling, and furniture therein, to Sarah Hirsch, owner, running five years, in the sum of $2,500 each on the house and $500 on the furniture, aggregating $6,000 of insurance against loss or damage by fire. The policy issued by the Traders' Insurance Company contained the provision: "If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain, without notice to and consent of this company, in writing, or the risk be increased by the erection or occupation of neighboring buildings, and by any means whatever within the control of the assured,

without the assent of the company indorsed thereon," then the policy shall be void. The policy of the Agricultural Insurance Company contained a condition as follows: "If, at the time of effecting this insurance, any dwelling house hereby insured shall be unoccupied as a dwelling, and not so stated in the application, or if, without written consent and indorsement thereon, such dwelling house shall cease to be occupied as a dwelling house, then, so long as such dwelling house shall be so unoccupied, this policy shall be void, and of no force and effect." July 9, 1884, Mrs. Hirsch sold and conveyed all the property insured, including the furniture, to Miss Frances T. Race, who, to secure the unpaid purchase money, gave her four promissory notes of that date, payable to Sarah Hirsch,—one for $1,000, due March 1, 1885, and three for $1,333, each due March 1, 1886, 1887, and 1888, and each bearing interest at 6 per cent. per annum,—and to secure the payment thereof executed to Julius Rosenthal a deed of trust on the real estate sold, containing a clause authorizing the holder of all such notes to declare them due in default of payment of any one thereof, or of the interest thereon. At the time of such sale, and as part of the transaction, the policies of insurance in question were assigned to Frances T. Race, with the consent and approval of the insurance companies. Before these policies were delivered to Miss Race, Rosenthal, trustee, sent the policies to the offices of the insurers to procure consent to such assignment, and also to procure the insertion therein of the mortgage clause hereinafter mentioned. The direction was given by Rosenthal in the presence of appellee, Race, and the policies were delivered to Rosenthal by the direction of appellee, Race. The mortgage clause inserted in the policy of the Traders' Insurance Company, and made part thereof, is as follows: "Loss, if any, payable to Julius Rosenthal, trustee, as hereinafter provided; it being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: provided, that in case the mortgagor or owner neglects or refuses to pay any premium due under

this policy, then on demand the mortgagee or trustee shall pay the same. * * * It is also agreed that whenever this company shall pay the mortgagee or trustee any sum for loss under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made, under any and all securities held by such party for the payment of said debt. But such subrogation shall be in subordination to the claim of said party for the balance of the debt so secured. Or said company may, at its option, pay the said mortgagee or trustee the whole debt so secured, with all the interest which may have accrued thereon to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, with all securities held by said party for the payment thereof. This slip, being attached to policy No. 28,276 of the Traders' Insurance Company of Chicago, Ill., forms part of said policy. S. A. ROTHERMEL, Asst. Sec. Dated July 10th, 1884." A like clause, in effect, was inserted in the other policy. The dwelling house, with part of the furniture therein, was destroyed by fire May 5, 1885. The insurance companies, claiming that the policies were void as to the owner, Miss Race, because the premises had ceased to be occupied as a dwelling house before and at the time of its destruction, paid to Rosenthal, trustee, the amount due on said notes, May 25, 1885, the amount then being $4,840, and that by reason thereof they became entitled to be subrogated to the rights of the mortgagee. The trustee, on such payment being made, assigned and delivered the notes and trust deed to the Traders' Insurance Company, whereupon demand was made for the payment of the note then past due; and, on failure to pay the same, said company declared all of the notes due, and on June 20, 1885, filed this bill in the superior court of Cook county, against Frances T. Race, to foreclose said deed of trust. The Agricultural Insurance Company, July 9, 1885, interpleaded and filed its cross bill, claiming to have joined the other insurance company in the payment to Rosenthal, and claiming the same right and asking the same relief. On the 27th of July, 1885, Frances T. Race brought

an action at law upon the policy against the Traders' Insurance Company in the state court, and against the Agricultural Insurance Company in the circuit court of the United States, upon its policy. Upon supplemental bill filed the prosecution of these suits at law was enjoined. On the hearing the superior court found that the policies had severally been forfeited under the nonoccupation clause, and entered a decree in accordance with the prayer of the bill. On appeal the appellate court reversed the decree of the superior court, and dismissed the several bills for want of equitable jurisdiction; and the case is brought to this court on appeal of the insurance company.

PER CURIAM. The question whether appellants were entitled to subrogation to the rights of the mortgagee in the notes and mortgage mentioned, and to foreclose the mortgage, was one of equitable cognizance. Their right to pursue the remedies for the foreclosure of the mortgage vested by that instrument in the mortgagee could not be determined except in a court of equity; and that court, having jurisdiction of the subject-matter, had the power to determine all incidental questions affecting the right claimed. If the contract of insurance was for the indemnity of the mortgagor as well as the mortgagee the right of subrogation depends in this case upon the question whether the policies have been forfeited for the breach of the conditions therein. As originally issued the policies were payable to Mrs. Hirsch as owner, and contained clauses of forfeiture if the building became vacant and unoccupied as a dwelling house without notice to and consent in writing by the insurance companies. When the property was sold the policies were assigned to the purchaser, with the consent of appellant companies, and a mortgage clause inserted to cover the interest of Mrs. Hirsch as mortgagee. The interest of Hirsch was $5,000, being $1,000 less than the face of the policies. Appellants consented to the assignment to Rosenthal, trustee, to whom the loss, if any, was to be paid. The effect of this change in the policies was to create a contract at variance with the original policies, in this: that the interest of Mrs. Hirsch as mortgagee, whatever it might be, was insured, while the residue of the policy stood as indemnity against loss by appellee. Under the policies the companies, in case of loss,

obligated themselves to pay to the trustee, for the benefit of Mrs. Hirsch, a sum not exceeding the amount due under her mortgage, and the balance to the mortgagor. The contract as to the mortgagee was freed from the forfeiture clause; that is, from the condition providing that the policy should be void while the property remained unoccupied, which was, however, continued in force as respected the interest of the mortgagor. The insurance to be paid, except as to the interest of Mrs. Hirsch, was still liable to forfeiture under this nonoccupation clause. The language of the mortgage clause inserted, that "this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner," clearly indicates that the insurance was not kept in force for the mortgagee's interest only, but that it was intended to keep it in force, according to its original terms, for the benefit of the owner to whom the policies had been assigned with the consent of the insurance companies. The effect of the mortgage clause inserted was to take the mortgagee's interest out of the clause of forfeiture for nonoccupancy, etc., and leave the policy in force, covering the interest of the mortgagor, subject, however, to that clause.

The mortgagor had, therefore, an interest in the policies—*First*, that the debt be paid in case of total loss, and she thereby relieved from liability therefor; and, *second*, to have the balance due under the policies paid to her, if they continued in force at the time of loss. As we have seen, the interest of Race was liable to forfeiture for breach, of the conditions of the policies; and, if such forfeiture was incurred, appellants had the right, on paying the mortgage debt, to be subrogated to the mortgagee's right, as against the mortgagor. In such case the notes and mortgage would rightfully be assigned to appellants, and they be entitled to foreclose the same. The mortgage clause, however, provides, that, in case of loss under such circumstances as that appellants shall deny their liability to the mortgagor, they may pay to the mortgagee the sum due under the mortgage, and become entitled to an assignment of the mortgage debt and all securities therefor. The right to subrogate, however, cannot be said to depend upon the naked claim of appellants that there is no liability on the policies to

appellee, but the facts must warrant such claim. The claim to entitle them to an assignment and subrogation must be made in good faith, and be based upon a state of facts which, under the contract of insurance, would entitle them to exemption from liability. The rights of a party insured cannot be made to depend upon the arbitrary claim of the insurer. Van Arman v. Byington, 38 Ill. 443; Furlong v. Cox, 77 Ill. 293; Davenport v. Ledger, 80 Ill. 574.

Assuming, then, that equity has jurisdiction to enforce the contract of subrogation and to foreclose the mortgage, it must, as incidental to that jurisdiction, have jurisdiction to pass upon all questions upon which that jurisdiction depends. Proof of the destruction of the property and of the amount of the loss fixed the liability of appellants to the mortgagee. But to entitle appellants to be subrogated to the rights of the mortgagee, and to foreclose the mortgage, the burden is upon them to prove that the loss occurred under circumstances exempting appellants from liability to appellee for the loss of the property; for, appellants being liable to pay the mortgagee as well where they are liable by virtue of the terms of their original contracts of insurance as where they are only liable by virtue of their enlargement of those contracts by their contracts with the mortgagee, it is impossible that it can be inferred from the mere fact of paying that appellants were liable to pay upon the one ground rather than upon the other. Moreover, since appellants seek relief in a court of equity rather than in a court of law, where appellee would be entitled to have the questions of fact passed upon by a jury, the evidence to be considered, and the relief that shall thereupon be granted, must be such as are within the principles applied in courts of equity. One of these principles is, a court of equity will never enforce either a penalty or a forfeiture. 2 Story, Eq. Jur. § 1319; 1 Pom. Eq. Jur. §§ 459, 460. And so it must follow here that, to entitle appellants to the relief they claim, they must prove, not merely that the premises were vacant or unoccupied at or before the time the fire occurred which destroyed the insured property, but that such vacancy or unoccupancy contributed in some degree to the causing of that fire or the prevention of its extinguishment; for, if the causation and the control of

the fire were unaffected by the fact of vacancy or unoccupancy, to allow appellants to avoid liability, and recover what they have paid on account of the insurance, by a foreclosure of this mortgage, would, in effect, be to enforce a forfeiture,—decree a recovery,—on a mere technical legal breach of a contract.

The evidence wholly fails to show that the property would not have been destroyed precisely as it was if a family had been residing in the house at the time. The brother and sister of appellee were in the house when the fire which destroyed it began. Fires had been lighted for legitimate purposes, such as they would, presumably, have been lighted for by a family residing there, in grates or stoves, some hours before the destruction of the property; and, so far as we are authorized to infer anything in that respect from the evidence, every care was observed that would have been observed by a family residing in the house at the time. It is insisted in argument by counsel for appellants that the fact that the house had not been continuously occupied, for some time before its destruction, by a family residing in the house, rendered the flues less secure, and increased the danger arising from their use on the day the fire occurred. We have been unable to find any evidence in the record sustaining this contention, and we are unable to assert it as a fact within judicial cognizance.

It follows, therefore, that we are of opinion that the evidence did not warrant a decree of forfeiture of the policies, and that appellee had a right to have the mortgage debt paid, for her benefit, and to be paid the balance, if any, of the insurance money to herself. The payment of the mortgage, being for her benefit, operated as a satisfaction and extinguishment of her debt, and the insurance companies acquired no right to enforce the same as against her. By such payment to the trustee, Rosenthal, appellants discharged their obligation, *pro tanto,* under the policies, and are entitled to credit for the sum so paid, and are liable to her for the balance, if any, remaining unpaid. We are of opinion that the judgment of the appellate court, dismissing the bills, was correct, although we are not prepared to agree with that court on the ground upon which its judgment was based. Appellee not having filed a cross bill, no

affirmative relief can be granted her in this proceeding. The judgment of the appellate court is affirmed.

Accord. Ft. Scott Building and Loan Ass'n. v. Palatine Ins. Co. Lim. 74 Kan. 272,—86 Pa. 142.

Note. Where the insurance is procured by the mortgagor and the premiums are paid by him, and at his request the policy is made payable to the mortgagee, the insurer does not become subrogated to the rights under the mortgage. The payment to the mortgagee in such a case operates to pay the mortgage. First Nat. Bank v. Ins. Co. 2 Tenn. Ch. App. 90; Pendleton v. Elliott 67 Mich. 496,—35 N. W. 97.

FARMERS' ALLIANCE MUT. FIRE INS. CO. v. VALLIE.

Supreme Court of Colorado. Dec. 4, 1905. 35 Colo. 72, 83, Pacific 962.

Right of Subrogation; as defense to Action on Policy.

Maxwell, J. This is an action upon a fire insurance policy for loss by fire. From the complaint it appears that the defendant in error, plaintiff below, was the owner of certain hay in stacks on the premises described. August 20, 1898, plaintiff in error, in consideration of premiums paid and to be paid, issued to defendant in error, its policy of insurance against loss by fire on sundry buildings, grain, and hay in stacks and in barn, on the described premises; $1,000 of such indemnity sum covering and applying to grain and hay in stacks and barn. October 31, 1898, 107¼ tons of hay in stacks was wholly destroyed by fire, whereby loss was sustained by defendant in error in the sum of $703.50. All conditions as to proof of loss imposed by the policy were complied with. Demand for payment of the loss was refused by plaintiff in error.

Plaintiff in error admitted in its answer that it issued the policy of insurance mentioned in the complaint upon the terms, and upon the property stated in the complaint; that a fire on

or about the date mentioned destroyed some part, or all of the insured and other property of plaintiff, occasioning a loss to him in an amount unknown; that such loss had not been paid. A second defense admits liability for the loss, but only as to the hay covered by the insurance policy, and avers that the fire which destroyed the hay occurred through the negligent operation of locomotive engines by certain railroad companies or the receiver thereof; that such railway companies or the receiver thereof, were liable for such damages for the full value of all the hay destroyed; that within 30 days following the fire, the plaintiff agreed with the defendant, that in consideration of the primary liability for the loss of the insured hay being with the railway companies or the receiver, and the secondary liability being with the defendant insurance company, he (plaintiff) would allow the defendant to recoup its loss from the railway companies or receiver, and that he (plaintiff) would not collect any money or damages on account of the loss from the railway companies or receiver, and in no event would he settle or release his cause of action against the railway companies or the receiver; that thereupon defendant stated to plaintiff that it would pay whatever plaintiff proved the loss to be, not exceeding the amount of the insurance thereon, but that prior to such payment, plaintiff would allow defendant a reasonable time to collect from the railway companies or the receiver, and in consideration of the premises plaintiff agreed with the defendant company that it should have a reasonable time to make such collection before paying the plaintiff the loss under his policy; that neither of said companies nor the receiver would make settlement with the defendant, and soon thereafter defendant gained knowledge that plaintiff had settled with the railway companies or the receiver for all of his loss on the hay insured and other property; and that the plaintiff executed and delivered to the railway companies a certain written instrument in the nature of a receipt, material parts of which are as follows: "U. Vallie, the claimant herein, hereby acknowledges payment of the sum of three hundred fifty ($350) dollars, acknowledging that said sum is paid in full accord and satisfaction of any, every and all claims of every class or character against Frank Trumbull, receiver

of the Denver, Leadville & Gunnison Railway Company, or against the Colorado & Southern Railway Company, or either of them. By reason of the destruction by fire of one hundred thirty-two (132) tons of hay, three hundred (300) acres of pasture land, fences, and other property, all of which occurred during the month of October 1898, and which hay was destroyed on or about October 31, 1898, between mile posts 81 and 84, on section 19 township 8, range 75 west, in Park County, Colorado. * * * It being distinctly understood in this compromise that the claimant has, for the purpose of compromise, deducted from his claim a substantial portion of insurance on said hay, which said insurance was carried with the Farmers' Alliance Mutual Fire Insurance Company of Colorado; the difference between the amount paid by the receiver and the said railway companies for said hay being collectible from the said Farmers' Alliance Mutual Fire Insurance Company of Colorado, by the said U. Vallie, claimant herein." The answer further avers that the cause of action referred to in the receipt is the liability of said companies, and receiver for said insured, and other hay destroyed; that by reason of the premises and the execution and delivery of said written instrument, the plaintiff in violation of his said express agreement with the defendant, and of the equitable right of subrogation of the defendant, absolutely settled, compounded, and released the said cause of action, and took the same away from this defendant, and prevented the defendant from recovering the amount of the loss from the said railway companies or said receiver, to the direct damage and injury of defendant in the sum now claimed by plaintiff in his complaint; that the plaintiff thereby appropriated the fund available and belonging in equity to the defendant for recoupment, and paid himself the insurance due on account of said hay out of this defendant's said fund, and the said insurance policy, as far as the said loss of said hay is concerned, is now fully paid and discharged.

To this answer a reply was filed, which in substance denied all of the material allegations of the answer, and further averred that while it was true that the cause of action with reference to the fire loss in the receipt mentioned is the liability of the companies or the receiver for said insured hay and other

hay destroyed, it is not true that said cause of action and liability was the only cause of action and liability in said writing referred to, and in said settlement included, the fact being, that the cause of action and liability for pasturage and fences burned was also included in said receipt, and that the amount paid and receipted for no more than fully paid said other cause, and that the release of said fire loss cause of action was without consideration.

A trial to the court resulted in a judgment in favor of defendant in error for the amount claimed, to wit, $703.50. The abstract of the record presented by counsel for plaintiff in error contains the pleadings, the findings, and judgment of the court below, and what purports to be the testimony of plaintiff, and the secretary of the insurance company, to the effect, that the plaintiff had notice that the insurance company desired to collect from the receiver of the railroad companies, and that the settlement made by plaintiff with the receiver of the railroad companies, was against the protest of the secretary of the insurance company. We are wholly unadvised by the abstract of record as to what the evidence at the trial disclosed, other than as above stated. The errors assigned are that the court erred in finding the issues, and in rendering judgment for plaintiff.

The position of counsel for plaintiff in error (as set forth in his printed brief) seems to be that the fire having been caused by the railroad companies, the insurance company had an equitable right, upon payment of the loss, to be subrogated to all the rights of Vallie; that when he settled with the railroad companies there was no right either in law or equity to which the insurance company could be subrogated, and that Vallie, by taking payment from and releasing the railroad companies, took away the highly important right of the insurance company; that he cannot have two payments for the same loss, and hence has no cause of action against the insurance company. The answer of the insurance company admitted that the loss had not been paid to Vallie by the insurance company. All of the authorities are to the effect, that the right of subrogation will not be enforced, until the creditor or other person to whose place subrogation is claimed, has been fully

satisfied. The rule applicable to this case is as follows: The right of subrogation does not accrue, until full payment of the liability which gives rise to such right on the part of the insurance company claiming to be subrogated. Where there is no express covenant contained in the policy requiring the insured to assign to the company any claims he may have against any one whose negligence or fault may have caused the loss, no subrogation can be demanded, until the company has paid the loss, and the insured may settle with and release the negligent party as to damage, other than that insured, without affecting his remedy against the insurer. If, however, the insured recovers from the negligent person for the whole loss, he cannot afterward sue the insurer. May on Insurance, § 454. See, also, Fire Insurance Co. v. Fidelity Co., 123 Pa. 516, 16 Atl. 790, 10 Am. St. Rep. 543; Insurance Co. v. Fidelity Co., 123 Pa. 523, 16 Atl. 791, 2 L. R. A. 586, 10 Am. St. Rep. 546; Railroad Co. v. Pullman Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. Ed. 97. It appears from the receipt set forth in the answer of plaintiff in error and the replication, that other property than the insured hay was destroyed by the fire, and that the receiver of the railroad companies settled with defendant in error for the loss of the other property and a portion of the insured hay. There is no evidence presented by the abstract of record to indicate that defendant in error recovered from the railway companies or the receiver the whole loss sustained by him by reason of the fire.

Counsel for plaintiff in error, not having called our attention to any error by the abstract of record prepared and filed by him, to which we confine our investigation, under the authorities above cited, the judgment must be affirmed.

Affirmed.

CAYARD ET AL. v. ROBERTSON & HOBBS ET AL.

Supreme Court of Tennessee. Oct. 22. 1910. 131 S. W. 864.

Indemnity Insurance.

Beard, J. The complainants, in part as owners and in part as lienors, are interested in a judgment for $5,000, rendered against Robertson & Hobbs for a fatal injury received by an employé while in their service, as a result of their actionable negligence. This judgment has not been paid, and, on account of the insolvency of the judgment debtors, cannot be collected out of them. At the time of the injury Robertson & Hobbs were carrying an employer's indemnity policy, issued to them by the New Amsterdam Casualty Company, which covered the injury that constituted the original cause of action, to the extent of $5,000. The present bill is filed against these parties and the Casualty Company, in which, after making all necessary allegations of fact, the complainants ask a decree against all the parties defendant, and especially against the Casualty Company, upon the policy referred to. While conceding by its demurrer the averments of fact made in the bill, the company denies, as a conclusion of law, all privity with the complainants, or any liability to them by reason of the issuance of the policy for the injury or death of the employé in question.

The introductory provision of the policy is as follows: "In consideration of one hundred and fifty dollars premium, * * * the New Amsterdam Casualty Company * * * does hereby agree to indemnify Robertson & Hobbs * * * for the term of twelve months * * * against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any employé or employés of the assured while on duty. * * * caused by the negligence of the assured, * * * and against the expense of defending any suit for such damages."

After limiting the liability of the company "from an accident resulting in injuries to or in the death of one person" to $5,000, under the head of "General Agreements" the following provisions or conditions were made:

"(1) The assured, upon the occurrence of an accident, shall give notice in writing within five days of the event causing the injury, with full particulars thereof, to the home office of the company at New York City, or its duly authorized agent. He shall give like notice, with full particulars, of any claim which may be made on account of such accident.

"(2) If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, immediate notice thereof shall be given to the company, and the company shall defend such suit in the name and on behalf of the assured, or settle the same.

"(3) The assured shall not settle any claim except at his own costs, nor incur any expense, nor interfere in any negotiations for settlement, or in any legal proceeding, without the consent of the company previously given in writing. * * * The assured, when requested by the company, shall aid in securing information and evidence, and in effecting settlements, and in case the company calls for the attendance of any employé, or employés, as witnesses at inquests and in suits, the assured will secure his or their attendance, making no charge for his or their loss of time.

* * * * * *

"(7) No action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a final judgment after trial of the issue."

We had occasion in Finley v. Casualty Company, 113 Tenn. 592, 83 S. W. 2, to consider a policy in all material respects like the one at bar. We there recognized the distinction made by the authorities between a policy insuring an employer against liability and one agreeing to indemnify the assured "against loss from liability for damages," and it was held that the policy then in question was of the latter character, and, further, that the amount of the insurance provided for in the policy did not become available until the payment of the loss by the assured, and could not be impounded by an employé and appropriated by him to an unsatisfied judgment against his employer.

We are entirely satisfied with the conclusions announced in that opinion, and it is necessarily controlling here, unless the two cases can be materially distinguished. This, it is insisted by counsel for complainants, they have succeeded in doing. The facts relied upon as radically distinguishing this from the earlier case and relieving complainants from its authority are that upon the occurrence of the accident and notice thereof the New Amsterdam Casualty Company, conceding that it fell within the terms of the policy, "undertook and assumed exclusive control of negotiations for settlement and of the defense of the suit" instituted by the injured employé, and "conducted the same in the name of Robertson & Hobbs, who were excluded from all participation therein, except as agents and assistants of" the defendant company. It is upon these facts, as well as under the terms of the policy, the contention is made by the complainants that the insurance company became the real defendant in that case, and that thus the benefit of the policy and liability of the company "inured" to them, and entitles them to a decree in this cause.

It is true, in the Finley Case, that the indemnity company did not interfere in any way with the suit which the injured employé brought against the master, but, to the contrary, denied liability for the injury, yet pending the suit it did pay the employer $50 in compromise and settlement of all claim under the policy. After the judgment obtained therein by the injured employé, he sought by a bill in equity to hold the Casualty Company liable for the amount of his recovery on two grounds: First, that the policy taken out by the employer upon the injury sustained by him inured at once to his benefit; and, second, if mistaken in this, then he had a right to impound the alleged debt in the hands of the company, and subject it to his judgment, because the compromise, mentioned above, was in fraud of his claim.

These two grounds for recovery were challenged as unsound by a demurrer, which was sustained by the chancellor, whose decree was afterwards affirmed by the Court of Civil Appeals. On being brought into this court by certiorari, after consideration, the decree of the latter court was in all things affirmed; this court holding that under the contract there was no privity

between the injured employé and the parties to the indemnity policy, that this contract was one between the company and the assured, and alone for his benefit.

If it be true, then, that the injured servant is not in privity with the parties to the contract, but that it is solely made for the benefit of the master, and, as is provided in the seventh of the general agreements, set out above, that no action will lie against the company for any loss, unless brought by the assured "to reimburse him for a loss actually sustained and paid by him," it is difficult to see how the indemnity company in the present case so changed its relations to the parties and the contract that it became onerated with and obligated to pay the unsatisfied judgment of the employé, because for its better protection it saw proper to avail itself of the terms of the general agreement No. 3, by defending the action in which that judgment was obtained.

To combat this view, and avoid the force of the holding in Finley v. Casualty Company, it is insisted that under the policy, when properly construed, in assuming the defense of the case against Robertson & Hobbs, the defendant company had placed itself under obligation to pay the judgment then recovered; and the counsel of complainants rely on Sanders v. Frankfort Marine, etc., Co., 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688, in support of their insistence.

The court delivering the opinion in that case is of recognized ability, and its decisions are entitled to great respect; but to accept its construction of the policy there involved would be to overrule Finley v. Casualty Co., supra, for the two cases cannot stand together. It is true, as has been stated, that in the latter case the indemnity company did not take part in the defense of the servant's suit against the master, or exercise any control over the master in resisting it, while in the Sanders Case the reverse was true, yet to hold, with that court, that "the insurer, after taking control of the proceeding against the assured, who is insolvent, cannot be discharged of liability, except by payment of the indemnity, or a settlement of the plaintiff's claim reduced to judgment," would be counter to our holding that in such a policy there is no privity between the servant and the parties to the contract, that the fund provided

for indemnity is not a trust fund, and the loss contemplated is that which the master sustains by the satisfaction of the judgment obtained against him.

It will be found, on examination of the opinion of the Supreme Court of New Hampshire, that the conclusion therein announced rests largely on that portion of section 2 of the general agreements, where, on receiving immediate notice of a suit brought against the assured to recover damages on account of an accident, covered by the policy, the company undertakes "to defend against such proceeding, in the name and on behalf of the assured, or settle the same, at its own costs."

To the word "defend," used in the section, is given the broad meaning "to protect, to secure against attack—in short, to successfully defend," and then holding that under this section, when the company undertook a defense, it "could only perform its covenant of indemnity by assuming the liability." On this point, it is said, in the course of the opinion, "the engagement is not merely to contest the suit to judgment, but to 'defend against such proceedings,' meaning necessarily all the proceedings in the suit founded on the claim for damages against the insured. The judgment is a proceeding in such a suit, as also is the execution. After final judgment, payment is ordinarily the only defense which will defeat further progress in the proceedings—the issuance of execution."

So, with this construction (and this was essential to avoid an irreconcilable conflict), it was held that the agreement or condition that "no action shall lie against the company as respects any loss under this policy, unless it shall be brought by the assured himself, to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment, after trial of the issue," was intended to "provide for the cases, if any should arise, where the company contended the claim arose from an accident not covered by the policy."

This court, however, gave a broader scope to this same clause in Finley v. Casualty Company, supra, and, construing it in connection with sections 2 and 3, held as follows: "While the company is bound to reimburse the assured for loss actually sustained and paid by him in satisfaction of a judgment recovered against him by an employé, yet, in order to make sure,

as far as possible, that there shall be no recovery as a basis on which subsequently to establish a claim, the company reserves the right to defend the litigation, also to supervise any settlement that may be made, and to have a free hand in negotiating settlements of a claim made against the assured. As stated, if these provisions—that is, the second and third general agreements—stood alone, they would furnish strong reasons for construing the contract as one against liability; but, from what has just been stated, it is perceived that they have a proper place in the contract against loss from liabilities from damage in the way of enabling the company to minimize the loss."

In Connolly v. Bolster et al., 187 Mass. 266, 72 N. E. 981, is presented a controversy similar in all respects to the one at bar. There the complainant, in a bill of equity, with an unsatisfied judgment against the master, rendered in a case where the indemnity company had assumed the defense, relied for his contention as to the liability of the company to him by reason of the terms of its policy on the authority of Sanders v. Frankfort Insurance Co., supra. The court, however, declined to follow that case, saying, among other things, that the word "defend," as used in the policy, had its natural import and that it meant there "what it means when counsel are retained to defend an action, and that it is not to be extended beyond that —to mean to successfully defend." As to the purpose and effect of the second clause, in which the word "defend" occurs, the court said that "they are plain, when taken in connection with the third. It is plainly inserted as an additional obligation and privilege for the protection of the insurance company, on the assumption that it is for the pecuniary interests of the company to be given the conduct of and to defend the action which is to fix its liability, and the amount to be paid when liable, rather than to leave that matter to be dealt with by the several persons injured, respectively. This does not result in the necessity of writing into clause 2 the qualifiying words 'until final judgment,' as the plaintiff contends, for when final judgment is rendered all defense is at an end. Nothing remains but a writ of review, or a writ of error, and, if such a proceeding were necessary, it might well be held to be covered by the obligation to defend. But when the defense is ended, and

in spite of the defense judgment is rendered against the insured, there is nothing to do but pay. Making payment of a judgment against it is no part of a covenant to defend the action. Whether the insurance company is bound to pay the judgment depends upon the terms of its agreement to indemnify the insured against loss, and the eighth (corresponding with the seventh clause in this policy) in terms provides that no action shall lie 'for any loss under this policy,' unless brought by the assured 'to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue.'"

In Allen v. Gilman et al. (C. C.) 137 Fed. 136, the same ruling is made. As to the opinion in Sanders v. Frankfort, etc., Insurance Co., supra, the court said: "It is certainly opposed to the weight of authority, and I am not satisfied with the construction of the policy that the court found it necessary to adopt, in order to avoid the force of the provision forbidding suit by the insured until after he has paid the employé's judgment."

We are satisfied with the reasoning and conclusion announced by these two latter courts. The view taken by them of a policy, such as is the one at bar, we think is entirely sound. It is in accord with the general conclusion reached by this court in Finley v. Casualty Co., supra.

We have examined the cases referred to by counsel for complainant in Kennedy v. Fidelity & Casualty Co. of New York, 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N. S.) 478, 117 Am. St. Rep. 658, and Nesson v. United States Casualty Co., 201 Mass. 71, 87 N. E. 191, 131 Am. St. Rep. 390, and find that they have no bearing on the questions raised. It follows that the action of the chancellor in overruling the demurrer to this bill must be reversed, and the bill is dismissed.

Accord. Allen v. Aetna Life Ins. Co. 145 Fed. 881,—76 C. C. A. 265 Carter v. Aetna Life Ins. Co. 76 Kan. 275,—91 Pa. 178.

Note. Under a stipulation that no action should lie against the insurer unless brought by the insured to reimburse him for loss actually sustained and paid in satisfaction of a judgment, the giving of a note in satisfaction of a judgment, if made in good faith and accepted by the judgment creditor, is such satisfaction. and a cause of action then accrues in favor of the insured.

Kennedy v. Fidelity & C. Co. 100 Minn. 1,—9 L. R. A. 478,—110 N. W. 97.

STATE ex rel. CROW ATTY. GEN. v. FIREMEN'S FUND INS. CO et al.

Supreme Court of Missouri. 1899. 152 Mo. 1.

Combination to Regulate Rates.

Marshall, J. (after stating the facts). 1. The special provision of the statutes of Missouri under which this proceeding is prosecuted, and which it is claimed the defendants have violated, is section 1 of the act of 1897 (Acts 1897, p. 208), and is as follows: "Section 1. Any corporation organized under the laws of this or any other state or country for transacting or conducting any kind of business in this state, or which does transact or conduct any kind of business in this state, or any partnership or individual, or other association of persons whatsoever, who shall create, enter into, become a member of or a party to any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, or to maintain said price when so regulated or fixed, or shall enter into, become a member of or a party to any pool, agreement, contract, combination or consideration to fix or limit the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to penalties as provided in this act: provided, however, that the provisions of this section shall not apply to agreements of fire insurance companies, or their agents, or boards of fire underwriters, to regulate the price or premium to be paid for insuring property against loss or damage by fire, lightning or storm in cities in this state, which now

have or which may hereafter acquire a population of one hundred thousand inhabitants or more; and provided further, that if such insurance companies, or their agents, or the board of fire underwriters doing business in any such city, shall combine in such city, either directly or indirectly, or agree or attempt to agree, directly or indirectly, to fix or regulate the price or premium to be paid for insuring property located wholly outside of such city against loss or damage by fire, lightning or storm, such company so violating the provisions of this act, either by itself, its agents, or by any such board of underwriters, shall be taken and deemed to have forfeited its right to do business in this state, and shall become liable to all the penalties and forfeitures provided for by the provisions of this act." The first question, therefore, is whether the defendant companies have entered into or become members of or parties to a pool, trust, agreement, combination, confederation, or understanding to fix the price or premium to be paid for insuring property against loss or damage by fire, lightning, or storm, or to maintain said price when so regulated or fixed. There is no room for doubt that prior to the amendment of 1895, which specifically brought insurance companies within the purview of the anti-trust laws, the Association of Fire Underwriters of Missouri was organized and maintained for the purpose of establishing and maintaining the rates at which property in Missouri would be insured against loss or damage by fire, and that Fetter was employed by the association to fix such rates, and see that they were maintained. Neither can it be doubted that when the act of 1895 became effective that association realized that its practices were violative of that act, and hence the association ceased to exist. This is clearly shown by the testimony of Fetter, and by his letter of June 11, 1895, above referred to. After the passage of that act, Fetter, on his own account, published a book of rates, which were the same as the rates that had been fixed and maintained by the association before the law went into effect. This book, with correction slips keeping it up to date, he sold and delivered to the defendant insurance companies direct, except that, when specially instructed by a company, he sent them to the local agent instead of to the company, and having it (and the cor-

rection slips) reach the agent through the company. All of the local agents of the defendant companies at St. Joseph had the book and the slips. Except in very extraordinary cases, all policies were written according to the Fetter rates; and when there was a variance the general agent was, at first, notified by a slip attached to the daily report, and later, when it was considered "inexpedient" to commit such matters to writing, the local agent was notified, and, if it was not corrected, the local agent was called to account therefor. Fetter had no fixed price for his book and slips, but charged each company eight or nine tenths of one per cent. of the volume of business done by each. After the act of 1895 became a law, the local agents of all the defendant companies, except those above noted, formed the Underwriters' Social Club of St. Joseph. The president distinctly stated that it would not put anything in writing that would lay the members liable to prosecution under the act of 1895 relating to trusts, and that everything that was done regarding the maintenance of rates would have to be understood by the members. No written constitution or by-laws were ever adopted. The club had no regular meetings, no club furnishings, paraphernalia, or usual accompaniments. When it met, each man smoked his own cigars, and talked about Lloyd's insurance companies and the mutuals, about "concurrency" and "correct practices,"—which was but another name for maintaining the Fetter rates,—or else called a member to account for a variance from the Fetter rates, and, although "whitewashing" him, "everybody arose to their feet and expressed a determination to live up to the rates." When the club was formed, a committee was appointed to select a secretary (doubtless one who was peculiarly social), and the committee went to Kansas City, and consulted Fetter, who kindly let them have one of his clerks, whom he had taken out of a dry-goods store a short time before, and who was therefore presumably "social," even if he was not an insurance expert, and knew nothing about St. Joseph or its insurable risks. This young man was taken to St. Joseph, and made secretary of this social club. He was installed in a room, with a copy of Fetter's book, a map of St. Joseph, a desk, and a few chairs. In order that he might not

become lonesome in the club rooms (where the members assembled only on rare occasions to smoke their respective cigars, talk about Lloyd's, the mutuals, concurrency, correct practices, call an offending member to account for writing a policy at a rate that varied from Fetter's, and stand up and promise to live up to the rates), and, just to be social, each of the local agents of the defendant companies sent him their daily reports, already inclosed in unsealed envelopes, addressed to their respective companies, and just to be social, he examined each report, and, so as not to forget his former benefactor, he compared the rates specified in each policy with the Fetter rates, and, if there was a variance, put a slip on the report, calling the attention of the general agent of the company to the variance, until it was discovered that this practice was "inexpedient," and in conflict with the expressed policy of this social club not to put anything in writing that would lay the members liable to a prosecution under the anti-trust laws, and then he adopted the more social process of notifying the local agents personally of the variance. Of course, each agent only wanted to keep up this daily social communication with the secretary of the club; and of course the secretary only wanted to be social when he insisted upon concurrency, correct practices, and the exclusive right to seal and mail all the reports from the local agents to the companies; and of course the monthly reports were likewise submitted to the secretary for social reasons, and not for the purpose of advising him that the agent had not circumvented Fetter's rates by giving the insured a rebate from the rate written on the face of the policy; and of course the higher officers of the defendant companies did not know (after it was deemed inexpedient for the secretary to put slips on the daily reports, showing variances from the Fetter rates) that their naughty local agents belonged to the social club, whose practices might, if put in writing, make them liable to prosecution under the anti-trust laws, and hence had forbidden them to be social, notwithstanding they did know that the policies were all written according to the Fetter rates, and were the same as they were before the anti-trust laws were enacted; and of course the general managers wondered why they had taken the trouble and gone to the expense of maintaining the association

of Fire Underwriters of Missouri, and had paid Fetter a salary to fix and maintain a rate in Missouri, before the passage of the anti-trust law in 1895, when, after that law went into effect, their local agents could maintain the same old rates, either unassisted, and at no expense to their companies, or else by means of a social club, which cost the companies nothing! But we decline to believe anything of the kind. The formation of the club immediately after the passage of the act of 1895 is admitted. The maintenance of the old Fetter rates as established and practiced by the Association of Fire Underwriters of Missouri, which was abolished immediately after the passage of the act of 1895, because it would violate that law, is not denied. The character of the club arrangements, and that it had no constitution or by-laws, and only occasional meetings, is conceded. The fact that all daily and monthly reports were submitted to this inexperienced young man, who was not an insurance expert, by all the local agents of the defendant companies, and that he alone had a right to seal and mail the reports to the companies, is confessed. The fact that each company paid Fetter for his book and correction slips a percentage on the volume of its business, and that the book and slips were sent by Fetter to the company, and by the company to the local agent, or else by Fetter to the local agent direct when ordered so to do by his company, is proved, and not controverted. And the conclusion is inevitable and irresistible that the Underwriters' Social Club of St. Joseph is a plain, palpable, but bungling pool, trust, agreement, combination, confederation, and understanding organized to evade the anti-trust laws of Missouri, but wholly inefficient for such a purpose. The local agents did it, and all knew it, and their knowledge is the knowledge of their companies, and their acts are the acts of their companies (Nickell v. Insurance Co., 144 Mo. 420, 46 S. W. 435); for it could not be tolerated for a moment that an insurance company could hide under the skirts of its agents, and violate the anti-trust laws of our state with impunity. These corporations can only act through agents, and, if their agents' acts or practices are in violation of their orders, they must suffer the consequences, for the law must be enforced whether the act violating it is done by one or an-

other of the agents of the corporation. The company can and must control its agents, and must see, at its peril, that its agents do not violate the law while attending to the business of the company. This is the rule as to libels, assaults, malicious torts by agents of incorporated companies; and there is greater reason for it being the true rule in cases involving the anti-trust laws. In fact, unless it was so, no company could ever be convicted of a violation of those laws, for they would do as the president of the social club said the club must do,—put nothing in writing that would make them liable to prosecution, keep no records, leave no tangible evidences or tracks of their doings.

A few illustrations of the liability of a corporation for the willful or malicious torts of its agents committed while in the prosecution of the company's business committed to their care, although the act is unknown to the president, board of directors, or manager of the corporation, will be sufficient to point the rule. For libel, Buckley v. Knapp, 48 Mo. 152; Johnson v. St. Louis Dispatch Co., 65 Mo. 539; and this extends to liability for criminal libel, State v. Boogher, 3 Mo. App. 442; Brennan v. Tracy, 2 Mo. App. 540. For malicious prosecution, Boogher v. Association, 75 Mo. 319. For assault and battery, Perkins v. Railroad Co., 55 Mo., loc. cit. 214. For conversion, Sherman v. Printing Co., 29 Mo. App., loc. cit. 38. For trespass, Favorite v. Cottrill, 62 Mo. App. 119. In this case, however, the companies cannot be heard to say that they did not know of or sanction the acts of their agents, for they have answered jointly, and boldly confess that they are writing insurance in this state, because they have been licensed to do so; and then they challenge the constitutionality of the act, and assert that it violates five different provisions of the constitutions of Missouri or of the United States, and contend that, having been admitted to do business in this state before the passage of the act of 1895, they acquired a vested right to do so in a manner fair and just among themselves, which vested right cannot be taken away from them by the act of 1895 without violating the fourteenth amendment to the constitution of the United States. In short, their answer is a clear admission that they have violated, and do violate, the act of 1895, but they declare that they have committed no offense in so doing, because, they say, that act

is unconstitutional. It is true that the answer closes with a general denial of all the allegations of the petition not admitted by the answer to be true, but this avails nothing in view of the character of specific defenses pleaded, which are all predicated upon the facts charged being true. If this be not the meaning of the answer, then so much of it as raises so many constitutional questions amounts only to a moot court proceeding, for, if it be true that the defendants have never done the acts charged, but have observed the requirements of the act of 1895, and avoided its inhibitions, then it is wholly immaterial in this case whether the act is constitutional or not. It is only upon the theory that they have violated it that they can be heard to question its constitutionality. And this is clearly the idea of the pleader in this case, and is the only way in which the general denial can be made to consist with the specific defenses. Trust Co. v. McDonald, 146 Mo., loc. cit. 480, 48 S. W. 486.

This brings us to the question whether the acts done constitute a pool, trust, conspiracy, or unlawful combination. The evident purpose of the social club was to maintain the Fetter rates. To accomplish this, their practice was for each agent to submit to their common agent—the secretary of the club—a daily report of all the policies written by each. This was done to enable him to see that they were not writing policies at a less rate than the Fetter rates. It could have been for no other purpose, for he was not an insurance expert, and they were experts; so they did not need his judgment or advice as to whether the risk was a proper or safe one. He could only watch them, and see that they followed "correct practices": that is, charged the Fetter rates. They could all have done this without him, but he was employed to watch them all for the benefit of each; to catch any one who atempted to cheat his confederates in the trust. This could have been the only purpose of submitting all the daily and monthly reports to him, and having him mail them to the companies. The companies all knew what rates their agents were to charge, for the Fetter books and slips were bought by the companies and furnished to their agents as a part of their supplies. They knew that the Fetter rates were charged and lived up to, because they could see that fact from every policy they issued. So that the pur-

pose, plan, pool, and trust are plain. The practice under the trust is also plain. The fact that the parties to the trust were treacherous to each other, and in the desire for business violated the trust agreement, and occasionally wrote policies for less than the Fetter rate, does not even tend to disprove the existence of the trust, for it is the experience of all lawful as well as unlawful associations that some of the members will violate the common agreement for a selfish purpose, and hence penalties are usually provided (as they were in this case) for such violations. Of course, there was no written agreement forming the trust, for that was "inexpedient," and might make the members liable to prosecution under the trust laws, as the president of the club well and wisely remarked when the club was formed. When people set out to do acts that are either mala in se or mala prohibita, they do not put up a sign over the door, or a stamp on the act, declaring their purpose and intent. Concealment is generally their prime object. But as such matters exist without agreements, and rest upon common understanding and practice, so the proof of their existence may be of the same character; and, while such laws are penal in their nature, and should be strictly construed (State v. Talbot, 123 Mo. 69, 27 S. W. 366; State v. Bland, 144 Mo. 534, 46 S. W. 440), nevertheless a pool or trust may be as conclusively proved by facts and circumstances as by direct, written evidence, for in this regard they are like all other frauds. As was well said by Campbell, J., in Webber v. Jackson, 79 Mich., loc. cit. 180, 44 N. W. 592: "While fraud is not to be assumed without proof, it is nevertheless oftener shown by circumstances than in any other way. When things appear that are contrary to the ordinary ways of honest business men, and call for explanations which might be, but are not, given, it is no violent inference to conclude that there is something wrong; and, where this occurs repeatedly, and is the general characteristic of the conduct and statements of the parties, it is their own fault if they are held to the consequences." And as was equally as well said by Sherwood, C. J., in Baldwin v. Whitcomb, 71 Mo., loc. cit. 659: "Whenever fraud is the matter in issue, any unusual clause in an instrument and any unusual method of transacting the business, apparently done with the view for ef-

fect, and to give to the transaction of the business an air of honesty, is of itself a badge of fraud." Pools and trusts are not of modern origin. The courts, at common law, ferreted them out, and placed the stamp of disapproval on them. Then they usually took the form of contracts in restraint of trade or creating monopolies. As early as the case of Mitchel v. Reynolds, 1 P. Wms. 181, Chief Justice Parker laid down the rule that such contracts were void if they were general, and Best, C. J., in Homer v. Ashford, 3 Bing. 328, said: "The law will not permit any one to restrain a person from doing what his own interests and the public welfare require that he should do." The same rule was laid down by Parke, B., in Mallan v. May 11 Mees. & W. 653. In those early days there was no legislation against such practices, but from the beginning the courts have recognized the dangers attending such combinations, and, in the absence of criminal, penal, or prohibitive statutes, have refused to enforce such contracts. It is not necessary here to review the cases where courts have held contracts valid which only partially restrained trade. It is only necessary to call attention to the fact that in such exceptional cases the main purpose of the contract was lawful, and the restraint was only a necessary incident or ancillary to the contracts, "to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." U. S. v. Addyston Pipe & Steel Co., 54 U. S. App. loc. cit. 747, 29 C. C. A. 151, and 85 Fed. 282. In the case just quoted, Taft, circuit judge, delivered the opinion of the court, which was concurred in by Mr. Justice Harlan, and Lurton, circuit judge, and we might well leave the law of the case at bar to depend upon that decision, for it is a most lucid, learned, and luminous exposition of all the law, ancient and modern, upon the questions here under consideration; so much so, in fact, that any attempt to enlarge upon the authorities cited and reviewed and the reasoning employed by the learned judge would prove futile, feeble, and foolish. After reviewing the instances where pools and trusts have undergone judicial scrutiny and condemnation, Judge Taft says: "Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reason-

able the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly." And so it is here. But the common-law remedy of refusing to enforce such contracts proved insufficient to prevent the blighting injuries to the public interests which modern trusts produced, and hence it has been found necessary by the national and state legislatures to enact drastic laws against trusts, pools, unlawful combinations and conspiracies, which will prevent and punish them, and not leave them to exist, and enforce their contracts among themselves, denying them only the aid of the courts as at common law. The general assembly of Missouri has done its duty in this respect. Our statutory law has been progressive. The act of May 18, 1889 (Acts 1889, p. 96), entitled "An act entitled 'An act for the punishment of pools, trusts, and conspiracies, and as to evidence in such cases,'" as was to be expected, was not efficient to meet all cases, and it was therefore found necessary to amend it in 1891 (Acts 1891, p. 186). Even this proved insufficient, and it was amended again in 1895 (Acts 1895, p. 237). Again the law was found not comprehensive enough to meet all cases (like this case, for instance), and the general assembly proved itself equal to the exigencies of the occasion, and passed the act of 1897, under which this proceeding was instituted (Acts 1897, p. 208). This act in express terms covers the case at bar, and the courts would be recreant to their duty, their past meritorious rulings, and to the principles they profess to practice and to teach, if they let the game out of the legislative trap in which it has been caught by any foced construction of law, or any distortion of the facts, or any maudlin sentimentality superinduced by the magnitude of the interests involved.

The Underwriters' Social Club of St. Joseph is a pool, trust, and conspiracy organized and maintained by the defendant companies, and is therefore an unlawful combination, and subject to the penalties prescribed by the act of 1897. "A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means, or a lawful end by unlawful

means." U. S. v. Addyston Pipe & Steel Co., 54 U. S. App. loc. cit. 764, 29 C. C. A. 162, and 85 Fed. 293. A trust is a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly. As was said by Chief Justice Fuller in U. S. v. E. C. Knight Co., 156 U. S., loc. cit. 16, 15 Sup. Ct. 255: "Again, all the authorities agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." In U. S. v. Trans-Missouri Freight Ass'n, 166 U. S., loc. cit. 342, 17 Sup. Ct. 559, it was said: "For these reasons the suit of the government can be maintained without proof of the allegation that the agreement was entered into for the purpose of restraining trade, or for maintaining rates above what was reasonable. The necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it." Just so here, the practice of the members of the social club had the effect of maintaining the Fetter rates, and hence constituted it a trust, no matter whether the members intended it to have that effect or not (and we have no doubt they did so intend it), and no matter whether they also intended to be "social" in the manner hereinbefore indicated or not. In the olden times such practices were called "contracts in restraint of trade." Nowadays they are called "trusts." There is no difference in the principle. There is a difference in the extent and methods. Those the courts condemned long ago were as mere saplings compared to the mammoth oaks when considered alongside of those of today. When the evils to the public interests that flow from these trust combinations are attempted to be described, words become mere weaklings in their power of expression, and one stands appalled at the helplessness of the people outside of judicial aid. This case strikingly illustrates the condition, and calls aloud for the enforcement of the statute. The facts establish the case laid against the defend-

ants, and the statutory results must follow, if the statute is valid.

2. The defendants challenge the constitutionality of the anti-trust law of Missouri, and cite two specific provisions of the constitution of Missouri and the fourteenth amendment of the constitution of the United States, which the act, or some part of it, violates, and we will consider the points in the order they are pleaded.

First. The title of the act of 1891, and the amendments thereof in 1895 and 1897, are said to infringe "that part of section 28 of article 4 of the constitution of Missouri which provides that no bill shall contain more than one subject, which shall be clearly expressed in its title, in this: that the subject of insurance against loss or damage by fire, lightning, or storm is a different subject, and not germane to the matters contained in the title of said act." The title of the act of 1891 is, "An act providing for the punishment of pools, trusts, and conspiracies to control prices, and as to evidence and prosecution in such cases." In Ewing v. Hoblitzelle, 85 Mo. 64, it was held that: "Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single; and, if it is sufficiently expressed in the title, the statute is valid." In State v. Miller, 100 Mo., loc. cit. 445, 13 S. W. 678, Black, J., said: "In adopting a title the legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the subject-matter covered by the act. Mere matters of detail need not be stated in the title." These cases have been many times cited approvingly, and have never been overruled, and state the law today. If a combination, arrangement, or understood course of dealing to fix and maintain prices or premiums to be charged for insuring property against loss by fire constitutes a pool, or trust, or conspiracy, then the title of the act of 1891 and its amendatory acts covers and embraces it. That it is a pool, or trust, or conspiracy is fully shown by what is hereinbefore said. It follows that this contention is untenable. The supreme court of Kansas reached the same conclusion in the case of In re Pinkney, 47 Kan. 89, 27 Pac. 179.

Second. It is claimed that section 30 of article 2 of the constitution of Missouri provides that "no person shall be deprived of life, liberty, or property without due process of law," and that this act violates that provision, because "it renders it unlawful for defendants to contract or agree among themselves, or with the agents of other insurance companies, or for their agents to contract and agree among themselves, for the reasonable adjustment and maintenance of rates of premium to be charged for insurance against fire, lightning, or storm in this state." This is a total misapprehension of the act. It does not prohibit any company, or the agent of any company, from contracting with any person who desires to insure his property upon any terms they two may agree upon. This is the extent and true meaning of the right to contract. It does prohibit any company, by itself or through its agents, contracting with any other company or its agent not to contract with the insured except upon terms which such insurance companies or their agents have previously established. In other words, it protects the company against the temptations of a trust or monopoly by refusing to permit it to strip itself of the power to freely contract, for under the arrangement shown in this case the applicant for insurance is free to contract, but the company and its agent has already limited and qualified its power by its previous contract with another company or its agent. The law has made this provision more out of regard for the otherwise helpless insurer than from tender consideration for the insurance company, but it incidentally preserves what it is here claimed it denies,—the free, unrestrained power to contract by both parties to it. Such laws have not only been adjudged constitutional by the supreme court of the United States (U. S. v. Trans-Missouri Freight Ass'n., 166 U. S. 290, 17 Sup. Ct. 540; U. S. v. Joint Traffic Ass'n, 171 U. S., loc. cit. 558, 19 Sup. Ct. 27), and by the United States court of appeals (U. S. v. Addyston Pipe & Steel Co., 54 U. S. App. 723-777, 29, C. C. A. 141, and 85 Fed. 271), but the princip'es they announce have been expressly sanctioned by the supreme courts of New York (People v. Sheldon, 139 N. Y. 251, 34 N. E. 785), of Pennsylvania (Morris Run Coal Co. v. Barclay Coal Co., 68, Pa. St. 173), of Ohio (Salt Co. v. Guthrie, 35 Ohio St. 666), of

Kentucky (Anderson v. Jett, 89 Ky. 375, 12 S. W. 670), of Iowa (Chaplin v. Brown, 83 Iowa, 156, 48 N. W. 1074) of Illinois (Craft v. McConoughy, 79 Ill. 346; More v. Bennett, 140 Ill. 69, 29 N. E. 888), of Wisconsin (Association v. Niezerowski, 95 Wis. 129, 70 N. W. 166), of California (Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Pac. 581), of Texas (Oil Co. v. Adoue, 83 Tex. 650, 19 S. W. 274), and of Louisiana (Association v. Keck, 14 La. Ann. 168). There is no more merit in this contention than there would be that a law was unconstitutional which prohibited two or more persons from conspiring to commit murder, or burglary, or any other felony. There is no such thing in civilized society as the unrestrained power to contract. Every man surrenders some of his individual rights when he associates with or becomes a part of any society or government, and the power of the government is complete to legislate so that, while according to every man the fullest possible liberty to do what he pleases with his own, he must not interfere with the similar right of others. This principle underlies and runs through all governments and societies, and is the corner stone of the police power of the state.

Third. It is contended that section 1 of the act is in violation of section 1 of the fourteenth amendment to the constitution of the United States, which provides "that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," because it discriminates between foreign and domestic insurance companies, and because these defendants had, prior to the enactment of this law, complied with the laws of the state of Missouri; and "that said act deprives them of the right to carry on their business in a manner fair and just among themselves, and not in any manner injurious to any other persons in the state; and that said act deprives them of the right of making the necessary and proper contracts relating to the business of insurance." Section 1 of the act of 1897 makes no distinction between foreign and domestic insurance companies, but, on the contrary, expressly covers "any corporation organized under the laws of this or any other state or country." So the postulate of this proposition is not true, and hence the conclusion fails. It is a misconception

of the fourteenth amendment to the Constitution of the United States to suppose that any person acquires any vested rights by complying with existing police regulations of county laws which cannot be affected by subsequent changes in such regulations or laws. Such compliance is equally the duty of the citizen and the stranger, and both are treated alike by this section of the act of 1897. Hence the protection which the constitution of the United States affords has not been denied or abridged by the passage of this law. This is too plain to need the citation of authority to support it, and is fully illustrated in the cases hereinbefore referred to.

Fourth. It is insisted that section 6 of the act of 1891, as amended by the act of 1895, violates the fourteenth amendment to the constitution of the United States in that it discriminates between foreign and domestic companies by making the act of the agent prima facie proof of the act of the company as to foreign companies, while such is not the case as to domestic companies. It might be conceded, for the purposes of this case, that this section is void for this reason, but that would avail these defendants nothing, for this section is not involved in this case, and no prima facie presumptions are invoked by the attorney general or indulged in by the court. The case has been tried and submitted and will be decided just as any other case involving a question of fact is tried, and the defendants have been accorded every privilege and presumption in their favor that any litigant can have or is accorded in any other kind of a case; even more so, for, the proceeding being penal in its nature, it is strictly construed, and its abuse or violation must be clearly proven. State v. Talbot, 123 Mo. 69, 27 S. W. 366. Aside from this, however, this section is clearly separable from the remainder of the act, and, if eliminated from it, the remainder of the act, and particularly sections 1 and 6, would constitute a sufficient law to reach and cover the offenses here charged, and, this being the case, it is wholly immaterial—in fact, a mere academic question—whether section 6 is or is not constitutional. County Court v. Griswold, 58 Mo., loc. cit. 199.

Fifth. It is further argued that sections 9 and 10 of the act violate the fourteenth amendment of the constitution of the

United States, because they allow an attorney's fee of not less than $25 nor more than $500 to be taxed against defendants in such cases, while no such fees are taxable against defendants in ordinary cases. What is said above as to section 6 applies to this contention with equal force. Besides, no such question, claim, or demand is set up in this case, and it will be time enough to consider it when a proper case involving such a claim is presented. A decision, in this case, of that proposition, might well be regarded as obiter dictum.

We have thus at great length set out the facts and circumstances disclosed by the record and the evidence, examined and reviewed the law bearing upon the case, and, with a lively appreciation of the effects and consequences to the 73 defendants, have reached the only conclusion which is possible on the facts under the law,—that the defendants are guilty of the offense charged against them of deliberately forming a trust to fix and maintain the price or premium to be charged and paid for insurance against loss or damage by fire, lightning, and storm, contrary to the provisions of the laws of this state; and, having reached this conclusion, it only remains to pronounce and enforce the penalty which the law has fixed and described in such cases. The judgment of the court is that the defendants be ousted of all rights, privileges, and franchises conferred by the laws of this state, and of their certificates to do business under the insurance laws of this state, and that they pay the costs of this proceeding, and that execution issue therefor.

As before indicated, the evidence does not show that the Newark Fire Insurance Company, Norwalk Fire Insurance Company, London Assurance Corporation, Citizens' Insurance Company of New York, Union Insurance Company of Philadelphia, or Equitable Fire & Marine Insurance Company of Providence, R. I., or their agents, were members of the Underwriters' Social Club of St. Joseph, but, as they have made common cause with the other defendants by the pleadings and joint answer, they will be treated in the same way as the other defendants, and the judgment of ouster will include them.

Burgess, Sherwood, and Brace, J. J., concur in all the opinion. Gantt, C. J., and Robinson, J., concur in all except the

judgment as to the five companies specified in the last sentence, and dissent as to that.

Valliant, J. (dissenting). I entirely agree with the majority of the court in the opinion that the acts charged in the information constitute an offense against the anti-trust statutes of this state, and I also agree that those statutes are constitutional and valid. I further agree that, if the agents through whom the respondents have conducted their business in this state have been guilty of the offense charged in the information, the respondents cannot escape the condemnation of the law on the plea that they did not authorize, or were ignorant of, the unlawful conduct of their agents. But the evidence, in my opinion, is not sufficient to convict them of the offense charged. It is shown by the evidence that the local agents of the respondent corporations were associated together in an organization called the Underwriters' Social Club, which was, in its general character, more of a business than a social society, though it was not devoid of the latter characteristics. In weighing the evidence, the name of the society adopted falls rather into the side of the scales against the respondents, because it seems to indicate to that extent an intention to mislead. But it appears that the club was the successor of one that had for its purpose, or at least for one of its purposes, the maintaining of certain rates of premiums, which, whatever its legal status might have been before, became, when the anti-trust statutes were adopted, unlawful; and in organizing the new society it may be that the members, in choosing this name, only desired to distinguish it, as far as a mere name could do so, from its predecessor, of which one Lancaster was the active officer. A great deal of the testimony is devoted to what is called the "Fetter book," and the use made of that book by the respondents. The author of the book is W. J. Fetter, an insurance expert of 50 years' experience. It is published on his own account, and sold to all insurance companies who will buy. The general purpose of the book is to indicate to the insurer the rate of premiums to be charged for insurance on the various classes of property in the locality, and to classify the property. According to the evidence, these rates are estimated from data derived from surveys and maps of the city, drawn

with special reference to furnishing information to the insurers as to the nature of the risk, and from personal inspection of the property, and are calculated by an experienced actuary. It is a book of technical information for all persons interested in that business, and is estimated in value, like all technical works, in proportion to its reputation, or in proportion to the reputation of its author. When used and relied upon, the effect is that the insurance agent writes a policy without making a personal inspection and survey of the property; and, the book being not only in the hands of the local agent, but also in the home office of the company, the latter may pass on the policy without a special survey and certificate of inspection. The evidence shows that the book is in extensive use, and that a large proportion of the business of the respondents in St. Joseph during the period covered by this inquiry was based on the rates given in the Fetter book. There is nothing unlawful in the character of the book, and nothing unlawful in the insurance companies basing their business ventures on the information it contains; and, even if the evidence showed that all their business was transacted on that basis, that would not, of itself, bring them under the condemnation of the law. The use that a fire insurance company, standing alone, may see fit to make of the book, is no more to be condemned than the use that a merchant may make of the daily price-current reports, or than that which a life insurance company may make of the tables of experience and of the prices at which such an insurance may be safely carried, compiled and computed by reputable authors and actuaries. But there is a use to which the book might be put that would be unlawful, and that is the use to which it is charged in the information these respondents have put it; that is, that they have made it a standard of rates, by agreement among themselves, which shall not be lowered. The evidence shows that before the anti-trust statutes were enacted there was a compact to maintain those or similar rates, and it shows that this so-called "social club" was organized just after that law went into effect, and the organizers had that law very much in mind. There was testimony in support of the information tending to show that while the ostensible object of the society was innocent, its real object was to violate

the law. But, on the other hand, while the testimony of the respondents was weak in support of the idea of its being a social club, yet it very satisfactorily showed that its main object was the regulation among themselves of the insurance business transacted by its members in particulars in which their mutual convenience was promoted, the public interest not prejudiced, and the law not violated. The testimony in support of the charge of the unlawful agreement to maintain rates is chiefly that of two witnesses, who were, or had been, members of the club, and between whom and the other members there seems to have arisen some unpleasant feeling growing out of their business. While both of these witnesses testify that there was such an unlawful agreement, yet they state it rather as their conclusion; their understanding of a tacit agreement. They say that no written agreement to that effect was made, and they do not state what, if anything, the members said among themselves that would constitute such an agreement. They undertook to give what they said the president said at the organization, which was, in substance, that they could not put anything in writing that would lay themselves liable to prosecution under the anti-trust law, and that whatever was done on the subject of maintaining rates would have to be understood among the members. One of these witnesses said that, if a member wrote a policy below the Fetter rate, the secretary would send it back to him, and he would be required to take it up. When the witness was asked what would happen if the member failed to take up the policy, he said that usually there would be a big row, and a "whitewashing." When asked to state an instance in which a member had been thus disciplined, he was able to remember but one, and that he so vaguely stated that it did not clearly appear either that the member had violated the supposed rule, or that any penalty followed. Another one of these witnesses testified that there was a penalty prescribed for cuting the rate, which was a fine of $50 for the first two offenses, and, after that, loss of his agency. On cross-examination he said that the agreement to submit to that $50 fine was in writing, signed by all the members of the club. That is in contradiction of his own previous statement and that of the other witness just mentioned, to the effect that no agreement on that

subject was reduced to writing for fear of the law. The evidence showed that the club had a secretary, whom it paid $75 a month. This secretary had been obtained by a committee sent by the club to Kansas City to consult Mr. Fetter on the subject, and was recommended by him as an efficient man for their business, he having been a clerk in Fetter's office. All policies written by the members and their daily reports were sent to the secretary, who examined them, and, if the policies were found correct, he forwarded them to the company; if anything wrong was discovered, either in the policies or reports, he sent them back to the agent for correction. The state's testimony tended to show that this was for the purpose of preventing any agent from cutting the rate. The testimony for respondents tended to show that the secretary was selected because of his skill in insurance business, and to aid the members in their technical work. All policies were sent to him for his judgment as to their being properly written. If there was anything wrong in the form of the policy, or in the description of the property, it was his duty to note the correction, and return it to the writer. When a number of policies were written by different agents on the same property, it was desirable that they should all be what in technical language they call "concurrent"; that is, substantially in the same form. It was the secretary's duty to see that such policies were concurrent, and, if one was found to be what they called "non-concurrent," his duty was to note the difference, and return it to the writer for correction. This could be done only by having a common agent of this kind, or by the more inconvenient method of a meeting of all the agents interested. In a few instances, when he first began his office, the secretary noted on policies that they were written below the rate indicated in the Fetter book, which was the usual standard, and returned them to the writers for such action as they might see fit to take; but it was done as a mere suggestion; the secretary took no further action on it, and he soon discontinued doing so. That he had nothing to do with fixing or maintaining the rates. That he made inspections of risks, and, when changes in the property or occupancy occurred, he reported it to Mr. Fetter at Kansas City, who, if, in his opinion, the change required it, prepared

for distribution to all his subscribers slips indicating a change in the rate of premium that should be made. The testimony of the president, secretary, and several members of the club was taken, and they all testify that there was no agreement to maintain rates. It is not every association of men engaged in the same business that is condemned by our anti-trust statutes, even though the object of the association be to facilitate the conduct of their business and promte their mutual interests. Such associations are not unusual, nor necessarily injurious to the public well-being. It was pointed out by witnesses in this case that there are features of the insurance business which render an association of the kind in question convenient and profitable to men engaged in the business, and that such an association may be conducted without in any particular violating the law. The fact that before the anti-trust laws were enacted insurance companies were banded in an association to maintain rates doubtless conduces to place any society they may now form under suspicion, especially at a period when the public mind is excited on the subject of trusts. But when there is a legitimate purpose for which they may organize, and when we are told by reputable witnesses that such was the purpose of this organization, and that there was no agreement to maintain rates, we have no right to disregard the testimony or overweigh it with suspicion. I have given the evidence in this case a careful study, and am satisfied that on the main question of fact the decided preponderance is in favor of the respondents, and the finding should be that they are not guilty of the acts charged, and the judgment that they be discharged.

Gantt, C. J. Concurring with my learned Brother that the relator failed to establish by the testimony that five of the defendants or their agents were guilty of the charges against them in the information, I am wholly unable to agree to his conclusion that, because they challenged the constitutionality of the statute under which they are prosecuted in common with their confederates, they should, for that reason, be held to have confessed the allegations of the information. As I understand the law, each defendant is liable only when it is shown to have been a party to the trust. The fact that it was sued in common with others, and filed a joint answer denying its liability, and al-

so the constitutionality of the act, does not amount to a plea of confession and avoidance. I regard this part of the opinion and the conclusion against them as a radical departure in the construction of pleadings, and hence I dissent. Robinson and Valliant, JJ., concur with me in these views.

AMPERSAND HOTEL CO. v. HOME INS. CO. et al.

Court of Appeals of New York. 1910. 198 N. Y. 495.

Unexecuted Conspiracy to Burn Property.

Gray, J. The plaintiff brought this action to recover the amount of the policy of insurance issued by the defendant the Home Insurance Company upon its hotel buildings and contents, which were destroyed by fire. Among other defenses interposed by the answer of the insurer was this, in brief: That the principal stockholder of the plaintiff, who was also its treasurer and a director and who had the management of its affairs, at a time shortly prior to the occurrence of the fire, had entered into a fraudulent conspiracy with one Van de Wall and others, "wherein it was planned that said Van de Wall should procure some person or persons to cause the destruction of the property by fire, to enable the plaintiff to recover * * * the insurance; * * * and that while said plan and conspiracy was still in existence and in process of accomplishment, the said fire occurred." When the case came on for trial, the plaintiff moved to strike out this separate defense as insufficient in law, and the motion was granted. The trial resulted in a decision in favor of the plaintiff; but the Appellate Division reversed the judgment, and ordered a new trial of the action. By reference to the opinion below, it appears that the reason moving the learned justices to the reversal was the action of the trial court in striking out the defense, to which I have alluded.

That presents the serious question in this case, upon which alone a difference of opinion exists in this court. So far as the practice is concerned, I may say that we do not think that the trial court committed any error in entertaining the plaintiff's motion. If the defense was insufficient in law, it was proper, when it had not been demurred to, to object to it at that time and to move for its dismissal. The advantage in such practice is that the ground to be covered by the evidence upon the trial is seasonably restricted.

The question whether the defense was a good one turns upon two provisions of the policy. The first one provides that the policy should be void "in case of any fraud * * * touching any matter relating to this insurance or the subject thereof." I do not think that there was any actionable fraud, within the meaning of the policy, in the fact alleged in this defense, because, whatever the evil design, nothing—no act—was done touching the insured property, or the contract of insurance. There was neither some fraudulent transaction working, or tending to work, wrong, or injury; nor did the conspiracy to defraud get beyond the stage of a mere plan to do something. A fraud was intended, as we must assume; but the intention, not being connected with any injury, remained a mere mental project. A conspiracy, to be the subject of legal complaint, must reach the stage of development where an overt act is committed, or some actual damage is occasioned. It must be put in execution and not remain in plan. It is not like a case where insurance is procured with a fraudulent intent on the part of the assured; for that would be insurance against knavery. If this defense asserts the truth, the question is how could an afterthought, an evil design later conceived to burn up the property, which never reached the point of anything done in accomplishment, be deemed to have affected the risk? The contract was unaffected, the subject of the insurance remained the same, and no liability of the insurer was increased.

The other provision of the policy is that it should be void "if the hazard be increased by any means within the

control or knowledge of the insured." I do not think that there was any increase in the hazard. I take that language as limiting the meaning of the provision to a case where by some act done to the property, which the assured knew of, or could have prevented, the company's risk had been increased. Ordinarily, we understand, and so the decisions run, that the hazard of insurance is increased when the risk is changed by some new use of, or some other burden placed upon, the property; that is to say, when the physical status or condition of the subject of insurance is rendered by some act of the insured other than what it was when the insurance was applied for and the application acted upon. It is said in May on Insurance (section 219) that the insurance "must be presumed to be made with reference to the character of the property insured, and to the owner's use of it in the ordinary way, and for the purpose for which such property is ordinarily held and used, or to cover risks incident to such use." Again, the same author, in speaking of the provision against any alteration, or change, in the situation, or circumstances, affecting the risk, says (section 218) that it "binds the assured not only to make any alteration or change in the structure or use of the property, which will increase the risk, but prohibits him from introducing any practice, custom, or mode of conducting his business which would materially increase the risk, and also from discontinuing any precaution represented in the application to have been adopted and practiced with a view to diminish the risk." In Joyce on Insurance (section 2207), the author, when referring to the provision against an increase of risk by the acts of the insured, speaks of "an act done by the insured," which, "although not included in the class of specific hazards, nevertheless, avoids the policy if it increases the risk." Here, though a conspiracy, as we must assume, was entered into, it was to execute a plan for defrauding the insurer. The conspiracy did not come to a head. The property and the contract to insure it were unchanged and unaffected by what was a mere proposal to affect them. The purpose to burn up the property never had ceased to be a purpose

within the domain of thought. It is not even alleged that the person was procured to execute the plan that was conceived. As the trial judge well suggested, the conspiracy remained but a mental conception. It was not the cause of the fire, and it had no connection with it. The parties charged with conspiring had not got beyond the stage where they might change their minds and repent them of their wicked design. They might conclude eventually to do nothing in completion of their conspiracy.

I think that a mere intention or plan to do an injury is of no consequence, where no act is done to effectuate it, and the party whose interests are aimed at is neither injured, nor exposed to loss, as the result of having put the plan into some way of execution. To allege that the conspiracy was in "process of accomplishment" when the fire actually occurred is not equivalent to the allegation of an overt act. It was nothing more than saying that the conspiracy was proceeding toward accomplishment. I am not aware of any case which holds that the hazard of insurance has been increased, unless some act has been done to, or about, the property, which changes it physically, or the burdens upon it, or affects its ownership.

The defendant could not sue for damages by reason of the conspiracy, and, if that be true, I think it could not set it up as a defense to the performance of its contract.

* * *

Willard Bartlett, J. (dissenting). I cannot assent to the proposition that the formation of a conspiracy to burn an insured building, which conspiracy is in process of accomplishment, does not increase the hazard. The hazard referred to is the risk of destruction by fire; and, according to the prevailing opinion, this risk is not increased by taking steps to carry into execution a plan to destroy the building by fire. The phrase "in process of accomplishment" in the answer can only mean that steps were being taken to effect the purpose of the conspiracy. It seems to me so clear that the hazard was thereby increased that I will simply record my dissent without further discussion.

CHAPTER II.

STOCK COMPANIES.

JOHN HANCOCK LIFE INS. CO. v. WARREN.

Supreme Court of Ohio. 1898. 59 Ohio St. 45.

Insurance. Right to Conduct. A Franchise.

Error to circuit court, Delaware county.

The action below was by William M. Warren against the John Hancock Mutual Life Insurance Company of Boston, Mass., to recover the amount of a policy of life insurance on the life of George E. Warren, son of the plaintiff below. The first ground of defense denied that George E. Warren was in good health at the time the policy was issued, and denied generally the allegations of the petition. The second ground of defense was in the words and figures following: "The defendant says that the policy of insurance set forth in the plaintiff's petition, and upon which his action is based, was issued upon an application made by the deceased, George E. Warren, to this defendant, which application is referred to and made a part of said policy of insurance, and that said policy of insurance provided that, if any of the statements made in said application are untrue in any respect, said policy shall be void. The defendant further says that the said application of the said George E. Warren contained certain interrogatories therein, in answer to which interrogatories the said George E. Warren stated that at the time said application was made he was in good health; that he had not been obliged to consult a doctor during the 10 years last preceding the date of said application, except once, and that was in 1893, for malarial fever, which sickness was of one week's dura-

tion; that the last time he had consulted a physician was in the year 1893, on account of said attack of malarial fever; that he had never had or been predisposed to the disease known as syphilis; and that he had never had any illness or disease other than malarial fever, in 1893. The defendant says that, at the time said statements were made, they were all and each of them false and untrue, and were known to be so by the said George E. Warren at the time he made them, and that they were made by said George E. Warren for the purpose of defrauding this defendant. The defendant also says that at the time said application was made the said George E. Warren had syphilis, and he knew it; that he had been obliged frequently, during the ten years immediately preceding the making of said application, to consult a physician on account of said disease; that he had had a disease or diseases other than as stated in his said application; and that he was not, at the time said application was made, in good health. This defendant says that the said statements in said application contained were the basis upon which the said contract or policy of insurance mentioned in the plaintiff's petition was issued, and that said contract of insurance would not have been entered into, and said policy of insurance would not have been issued, except that this defendant relied upon the truthfulness of said statements; and this defendant is not liable upon said policy of insurance, and prays to be discharged from this action, and to recover its costs herein." The reply admitted that the policy was issued upon the application set out in the answer, and that George E. Warren stated in his application that he was in good health, and denied the remainder of the answer, and claimed that the insurance company was estopped from denying the truth of the application. On the trial evidence was given tending to support the answer, and by the plaintiff below tending to support the truth of his reply, and the verdict and judgment were in favor of the plaintiff below for the full amount of the policy. The principal controversy in the trial of the case arose upon section 3625, Rev. St., which is as follows: "No answer to any interrogatory made by an applicant, in his or her application for a policy,

shall bar the right to recover upon any policy issued upon such application, or be used in evidence upon any trial to recover upon such policy, unless it be clearly proved that such answer is willfully false and was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent or company had no knowledge of the falsity or fraud of such answer." The circuit court affirmed the judgment of the court of common pleas, and thereupon the insurance company filed its petition in error in this court, seeking to reverse the judgment. Affirmed.

George K. Nash and W. Z. Davis, for plaintiff in error. F. M. Marriott and J. S. Jones & Sons, for defendant in error.

Per Curiam. In this state the subject-matter of insurance is a franchise. State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828. And the state has a right to prescribe the terms and conditions upon which it grants such franchise, and the insurance company, having accepted the franchise with its terms and conditions, is bound thereby, and must accept the burdens with the benefits. Section 3625 was in force at the time this policy of insurance was issued, and therefore the legal effect is the same as if the section was copied into and made a part of the policy. The section is therefore a valid constitutional enactment. This section was held constitutional by this court in Insurance Co. v. Brobst, 56 Ohio St. 728, 49 N. E. 1113. The case of Insurance Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 465, was decided before this section was enacted, and therefore cannot control the matter. This section was passed for the purpose of abrogating the rule laid down in that case. The court of common pleas, in the trial of the case, construed this section as requiring clear proof that the answers to the several questions by George E. Warren were wilfully false, and were fraudulently made, and were material, and induced the company to issue the policy, and that but for such answers the policy would not have been issued, and that the company and its agents had no knowledge of the falsity or fraud of such answers at and before

the delivery of the policy. In this there was no error. Such are the provisions of this section of the statute, and the statute should be construed so as to effect the intention of the legislature in passing the same. It will be noticed that the insurance company fails to allege that the answers to the questions were material, and without such allegation the answer failed to state a ground of defense, as it matters not how false and how fraudulent such answers may be, if they are not material they furnish no ground for defense to the company issuing the policy. There is therefore no error in the record, and the judgment is affirmed.

Accord. Orient Ins. Co. v. Daggs 172 U. S. 557; New York Life Ins. Co. v. People 95 Ill. App. 136,—195 Ill. 430; People v. Loew 44 N. Y. Supp. 42.

COMMONWEALTH v. VROOMAN.

Supreme Court of Penn. 1894. 164 Pa. St. 306.

Power of the Legislature to Restrict as to Who May Become Insurer. Penal Statutes.

Williams, J. This case raises the question of constitutional law that does not seem to have been decided by the courts of this state. The facts are that in 1870 the legislature passed and the governor approved an act entitled "An act to prevent the issue of unauthorized policies of insurance." Section 1 made it unlawful for any person, partnership, or association, to issue any policy of insurance against fire without authority to do so expressly conferred by a charter of incorporation given according to law; and declared all policies issued without such authority to be void. The second section made it a misdemeanor to issue a policy of insurance against loss by fire without the authority required by the first section. The

special verdict rendered in this case finds that the defendant did violate the act of 1870 by making and issuing for himself and others a policy against loss by fire, in the year 1894, without having obtained a charter of incorporation authorizing the making of such insurance. Upon this verdict the learned judge of the court below entered a judgment in favor of the defendant, holding that the act of 1870 was void, because in violation of the constitution of the United States and of this state. The commonwealth appeals.

A single question is thus presented, viz., does the act of 1870 violate the constitution of either the United States or this state? The learned judge held that the 14th amendment to the constitution of the United States was infringed by the act of 1870. This amendment declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deny to any within its jurisdiction the equal protection of the laws." The purpose and effect of this amendment have been discussed and declared by the United States courts in many cases, and there ought to be no doubt upon the subject at this time. It was aimed at discriminations made or attempted by the laws of any of the states against persons upon whom the laws of the United States conferred the rights and privileges of citizenship. Such discriminations, whether directed against persons of a particular race or color, resident within the state, or against persons resident in other states, are forbidden by the 14th amendment. But the proper exercise of the police power by the several states is not within the intent or the letter of the amendment. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. 992, 1257. On the other hand, its purpose was declared in the Slaughter House Cases, 16 Wall. 36, to be to protect "against the hostile legislation of the states, the privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states."

The act of 1870 strikes at no privileges of citizenship of the United States as distinguished from the privileges of citizenship of Pennsylvania. It does not attempt to draw

a line between citizens of this state and citizens of other states. It is therefore in no sense a violation of the 14th amendment of the Constitution of the United States, and this branch of the discussion may be properly dropped at this point, and our attention confined to the other, viz. is the act of 1870 a violation of the first section of the bill of rights in the constitution of this state? That section affirms that "all men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of * * * acquiring, possessing and protecting property and reputation." The methods by which this right to acquire property is asserted and exercised are, however, and have been since organized government began among men, subject to regulation by law. The power of government thus brought into service is known as the "police power." If the act of 1870 is a valid exercise of the police power, then no constitutional right is invaded, but the mode in which the right guaranteed by the first section of the bill of rights may be exercised consistently with the best good of the greatest number is regulated and prescribed. The general character of the police power is well understood, although neither the text-books nor decided cases have yet given us an adequate definition of it. Little more has been attempted by the courts of this country than to determine that a particular subject does or does not fall within the range of this power. An illustration is afforded by the Boston Beer Co. v. Massachusetts, 97 U. S. 25, in which this language was used: "However difficult it may be to render a satisfactory definition of it (the police power) there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals." Blackstone, in his Commentaries (vol. 4, p. 162), describes this power as the power of "public police and economy," by which the internal regulation and good order of the state is secured, and individual citizens, like the members of a well-ordered family, are made to conform their conduct to the rules of propriety, good neighborhood, and good manners. It is therefore a power inherent in all forms of government. Its exercise may be limited by

the frame or constitution of a particular government, but its natural limitations, in the absence of a written constitution, are found in the situation and necessities of the state; and these must be judged of, in the first instance, by the government itself. It corresponds to the right of self-preservation in the individual when the dangers that threaten the state come from without, the right of self-preservation is exercised in gathering armies and the means of public defense. When the dangers arise within the state, self-preservation requires their suppression. This is accomplished by the exercise of the police power which deals with all forms of disorder, and provides for the public welfare, and the protection of citizens against the violence and the fraudulent conduct of each other.

Now, the question whether any particular subject is so related to the public good as to justify the exercise of this power in its control, is one for the determination, in the first instance, of the law-making branch of the government. In disposing of it, the legislature is subject to no limitations, except such as the constitution of the state may impose. Within the lines set by constitutional provisions, the power of the legislature is practically absolute; but, if it is alleged that a given police regulation violates the fundamental law, a question is raised for the determination of the courts, whose duty it is to apply the constitutional tests and adjudge the law to be void if it is in conflict with them. In this case we are to apply the first section of the bill of rights to the act of 1870, in order to determine whether it can be enforced. If the act denies the inherent and inalienable right of the citizens to acquire, possess, and protect property, which is asserted by this section of the bill of rights, then the judgment of the court below was right, and this appeal should be dismissed; but if this right is not denied, and the effect of the act of 1870 is merely to regulate its exercise, then the judgment should be reversed and the defendant should suffer the penalty of the law he has disregarded. Before entering upon this question, three preliminary observations should be made: First, we must remember that the legal presumption is in favor of the

constitutionality of the act because it expresses the judgment of the legislative branch of the government upon that question. The legislature has considered the question and passed upon it and this makes a prima facie case in favor of the law. We observe in the next place that this question is to be considered upon the state of the law as it is when the question is raised. Since 1870 the constitution of the state has been remodeled, and many of its new provisions have been enforced by suitable legislation. Our question is not therefore whether the act of 1870 was valid under the constitution as it then stood, but whether it was valid when its provisions were invoked against the defendant in 1894. Our third observation is that the question is not controlled by common-law maxims. The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common-law rules to meet changed conditions in society and increased volume and improve methods in business. * * * * * * In view of the magnitude and the nature of the insurance business, it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires—First, permanency in the custodian of the funds gathered from them, and on which their indemnity in case of loss depends; second, an honest and competent administration of these funds; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders. How are these safeguards to be obtained? There is but one way in which they can be obtained and that is by means of general laws regulating the insurance business. Corporations derive their existence from the state, and hold their franchises subject to legislative control. They are subject to the visitorial power of the commonwealth, and they may be, and are, in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. The legality and business value of the

methods, the economy and financial strength of the management, and the value of the security provided for the holders of policies in any given company, are therefore subjects upon which the proper state officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitorial power. They cannot ordinarily be compelled to disclose their business methods, their financial condition, or the character of their investments. They cannot be restricted in the use of either their capital or their profits as corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The state can compel fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

In the next place, it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized. A general supervision and control of insurance companies has been assumed by the states, and exercised through the insurance department. In our state this system of legislation began as early as 1810, and it has grown in bulk and importance with the growth of business and the development of the resources of the state. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against fire, on the stock plan, at $100,000. It provides for a reserve fund for the security of policy holders. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy, and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies, organized under the laws of other states or countries to make certain deposits in this state, to secure those who are insured by them, and to appoint

some suitable agent, on whom process may be served in actions brought against them. These regulations have been made from time to time as their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them cannot be enforced against private persons or partnerships. As a matter of fact, the business has for many years been left to the corporations, and regulations made to affect corporations have therefore met fully the public need. At this time, however, private capital is seeking employment in this field, and it signalizes its entry upon the field by a denial of the power of the state over it. This question has been raised by the corporations of other states, but I recall no case in which it has been raised by individuals. In Doyle v. The Insurance Company, 94 U. S. 535, the Supreme Court of the United States stated the general rule thus: "A state has the right to impose conditions not in conflict with the constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another state, or to exclude it altogether."

It would seem to follow logically that the state might require all persons desiring to enter upon the business to comply with the same conditions, and, if necessary, to obtain a charter of incorporation in order to such compliance. An effort is made to distinguish between regulation and prohibition, and to hold that the act of 1870 is a prohibition operating upon all natural persons for the benefit of corporations who are thus given an oppressive monopoly of the business of insurance against fire. But the prohibition is only such as is necessary to give effect to the regulation which the act prescribes. The act implies a declaration by the legislature that the business of insurance against fire affects so many persons, and involves such large sums of money, as to make it necessary for the public protection that it be subjected to the supervision and control of the government; that the supervision required is such as private persons cannot be compelled to submit their business conduct to; and then expressly declares that all persons desiring to embark in the business must procure a charter of incorporation for that purpose, be-

cause corporations are subject to the supervision and control of the state that creates them. This is regulative. It directs the business into the only channel that admits the necessary measure of control, and it necessarily prohibits the business outside that channel. The traffic in intoxicating drinks is regulated by law; but the regulation prohibits absolutely all persons from engaging in it unless they have first secured the permission of the state, by obtaining a license under the law. Here, as in the act of 1870, we find permission to those who comply with the regulation, and prohibition to those who do not. The practice of medicine, the sale of drugs, and many other sorts of business are regulated by law; but the regulation would be without effect if it did not include a prohibition directed against those not qualified, and enforce it with suitable penalties. The police power of a state may be exerted for the complete or the partial control of a given business. It may prohibit it absolutely to all persons for the purpose of suppression. It may permit it to some person, and under certain restrictions, in order to secure control over it and hold it within proper bounds. Stone v. Mississippi, 101 U. S. 814. The Sunday laws, the laws against gambling, against lotteries, against disorderly houses, the sale of liquors, the sale of oleomargarine, the sale of drugs, and many similar laws afford instances of the exercise of the police power for the complete suppression of a given line of employment, or for its restriction and control. The act of 1870 belongs to the latter class. It does not prohibit the business of insurance but regulates it. It says to all persons interested: "If you wish to embark in this business, you must secure a charter of incorporation, so as to subject your business to the visitorial power of the state. If you will not do this, you must not engage in insurance against fire at all." This is not prohibition of the business, for the business is distinctly authorized. It is an effort to bring it under state supervision and control, by requiring all who wish to enter the business to put themselves in a position where the insurance legislation of the state will reach them, and

the insurance department of the state can supervise their business and compel observance of the law.

Without going further into the discussion, we may now state our conclusions applicable to the case before us. First. The business of insurance against loss by fire is, by reason of its magnitude, its importance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state. Second. The act of 1870 is a valid exercise of the police power. It does not prohibit but regulates, the business. It excludes no one from engaging in it, but prescribes the preliminary qualifications necessary for all alike to entitle them to enter the business. Third. The qualification is reasonable. It is open to all under general laws. It is not burdensome. Its only effect is to secure adequate capital at the beginning, and state supervision during the continuance of the business. Fourth. Upon the special verdict, judgment should have been entered in favor of the commonwealth, and sentence should have been pronounced under the act of 1870. That this may now be done, the judgment is reversed, the record remitted, and a procedendo awarded.

Accord. State v. Vigilant Ins. Co. 30 Kan. 585, 2 Pa. 587; Considine v. Metropolitan Life Ins. Co. 165 Mass. 462, 43 N. E. 201. In re Opinion of Justices 97 Me. 590, 55 Atl. 828.

STATE ex rel. ATTORNEY GENERAL v. FIDELITY & CASUALTY INS. CO.

Supreme Court of Minnesota. Dec. 27, 1888. 39 Minn. 538.

Foreign Insurance Companies—Quo Warranto.

Dickinson, J. This is a proceeding upon information in the nature of quo warranto to try the right of the above-named respondent, a corporation of the state of New York, to carry on within this state the business of insurance against these three classes of risks, viz., injury or death

of persons caused by accident, breach of trust by persons holding places of public or private trust, and the breakage of plate-glass. The case is presented for decision upon the relator's demurrer to the answer of the respondent. It is contended on the part of the respondent that this is not an appropriate method of procedure. We hold the contrary. A state has the power of a sovereign to prohibit foreign corporations from exercising their franchises, carrying on their ordinary corporate business, within its borders; and when, in defiance of such prohibition, and contrary to our law, a foreign corporation does assume to exercise corporate franchises in a manner affecting the public interests, quo warranto will lie for the purposes of determining the right in question, and of applying a remedy, although it is true that the courts of a state have no power to affect by their judgments the corporate existence of foreign corporations. We can restrain the exercise, within our own jurisdiction, of corporate franchises inconsistent with our own sovereignty, whether the corporation whose acts are in question be domestic or foreign. State v. Railroad Co., 25 Vt. 433. And see People v. College, 5 Wend. 211. It is said on the part of the respondent that we ought not to entertain the proceeding because the determination of the question whether it should be licensed and admitted to transact its business in this state is committed by law to a branch of the executive department of the state, and that the judicial department of the state has no constitutional control over the action of the executive department. In this the counsel for respondent fail to distinguish between the authority of the judicial department to control the action of executive officers, and the power and duty of the courts to determine, in causes before them, the rights of parties, although the legal propriety and effect of the action of executive state officers may necessarily be thus brought in question. We have assumed, without so deciding, that the insurance commissioner, in respect to the discharge of his duties, is exempt from judicial control.

The insurance commissioner, in granting certificates or

licenses to foreign corporations to do business here, acts in a ministerial capacity. His determination and action are not judicial and final. If our statute, to be hereafter recited, prohibits foreign corporations, under certain circumstances, to do business in this state, the authority or license of the commissioner in disregard of that statute would be unavailing. The respondent became incorporated in 1875, in the state of New York. The statute of that state then in force, and under which the incorporation was effected, (chapter 463, Laws 1853, as subsequently amended), authorized the incorporation of individuals for the purposes of carrying on either one (only) of the two classes or "departments" of insurance therein specified. The "first department" related to what may be briefly referred to as ordinary life insurance. The "second department," or specification of the purposes for which such incorporation was allowed, embraced, among others, the three kinds of risks against which, as is above stated, this company was organized to insure. In 1879, after the incorporation of this respondent, a statute was enacted amending the prior law above referred to. This amendatory act also authorized corporations to be organized for the purposes of insurance, as specified in two "departments" of the act, the first of which we may again refer to as embracing ordinary life insurance. The "second department" consisted of seven specified kinds or classes of risks, among which, designated as the second, third, and fifth classes, respectively, were the three kinds of risks above stated, which this respondent had been authorized to insure against, and in which business it is engaged in New York and in this state. Section 2 of this act declares that "no company organized under this act for the purposes named in the first department shall undertake either of the risks named in the second department, and no company organized under this act for either of the purposes mentioned in the second department shall undertake any business mentioned in the first department, nor shall any such company hereafter organized undertake or do more than one of the several kinds of insurance mentioned in said second department; and no

company organized under this act shall undertake any business or risk except as herein provided: provided, that nothing herein contained shall affect the business of any company heretofore duly organized under the second department of this act." Section 6 forbids the organization of companies under this act with a less capital than $100,000; and further provides that "no company organized for the purposes named in the second department shall commence business until they have deposited with the superintendent of the insurance department of this state at least the sum of $100,000," invested in a manner specified. Section 14 forbids any company or association incorporated by or organized under the laws of any other state government to do business unless it has the amount of capital required by the sixth section, and invested in a manner specified. A statute of the state of New York enacted in 1881, amending a prior law, enacted in 1877, required that every corporation or association, organized under the laws of that state or of any foreign country, to insure against damage to plate-glass, shall deposit $100,000 in securities with the insurance department of that state; and that no corporation or association existing under the laws of any other state of the United States with authority to insure against damage to plate-glass, should be permitted to transact business without having made a deposit of securities of the same amount with an officer of the state wherein such corporation or association may have been organized. In 1884 a statute was enacted in the state of New York providing that insurance companies incorporated under the laws of any other state should not transact business in that state until they had complied with the insurance laws thereof, having first appointed the superintendent of the insurance department their attorney, upon whom process against them might be served.

In our statute law is embodied this provision, (chapter 34, Gen. St. 1878, § 269): "When by the laws of any other state or nation, any taxes, fines, penalties, licenses, fees, deposits of money or of securities, or other obligations or prohibitions, are imposed on insurance companies of this

state doing business in such other state or nation, or upon their agents therein, so long as such laws continue in force the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business in this state, and upon their agents here." This respondent corporation has a capital of $250,000, has deposited securities as prescribed by the laws of the state of New York, and has complied with all the requirements of those laws. In 1881 the corporation, having complied with the requirements of the statutes of our own state concerning foreign insurance companies, as it has also ever since done, received from the insurance commissioner of this state a license or certificate of authority to do business in this state, since which time such certificates have been issued yearly. The validity of our statute, just recited, is not questioned. We are called upon to consider whether its proper effect is to exclude this respondent from prosecuting in this state its proper corporate business of insurance as to the several classes of risks above referred to, in view of the restrictions which, as is claimed on the part of the relator, the statutes of New York impose upon corporations which might be organized in our own state for like purposes. This company was lawfully incorporated for all these purposes in the state of New York, and, as is apparent from the proviso in section 2 of the act of 1879, there has been no attempt or purpose to abridge its charter rights, or the scope of its corporate action. It still is lawfully pursuing in that state the business for which it was lawfully incorporated. The policy of our own state, expressed in its insurance laws, in harmony with the general policy and law of comity prevailing among the states, allows such foreign corporations to engage in business here. This corporation has complied with the requirements of our statutes, and there is nothing in its character or purposes opposed to the policy or the laws of this state. In view of this interstate law of comity, and of the policy of our state, manifest in its legislation to allow such foreign corporations to do business here, this corporation should not, as a merely re-

taliatory measure, be excluded from doing so by a judgment of ouster, unless it is clearly apparent that the case is within the scope of our "retaliatory statute," as such laws have been termed; or, in other words, unless it is clearly apparent that if corporations were created within this state for the same purposes, they would be excluded by the statutes of New York from prosecuting their corporate business there, with substantially the same privileges enjoyed by this respondent. Whether that is clearly the effect of the statutes of that state, to which we have referred, is the question to be determined. This may be reduced to the more particular questions—First, whether a corporation of Minnesota, having authority by its charter to insure against the several classes of risks specified in the second department of the New York statute of 1879, might exercise that right in that state; and, second, whether the laws of the latter state so discriminate in favor of this respondent and against all foreign corporations in respect to the requirements as to the amount of capital and of deposits as to make our retaliatory statute applicable.

In considering the effect of the New York statutes it should be borne in mind that not only may the law of comity, by which generally corporations created under the laws of one state are allowed to extend their business into other states, be set aside by directly prohibitory legislation, but that the result is the same where from the general course of legislation it is clearly apparent that it is opposed to the established policy of the state to allow foreign corporations thus to act. Bank v. Earle, 13 Pet. 519, 592; Union v. Yount, 101 U. S. 352; 2 Mor. Priv. Corp. §§ 960, 965. The statutes to which we have referred do not directly prohibit foreign corporations from insuring against more than one of the several kinds of risks specified in the second department of the act of 1879. Section 2 of that act relates in terms only to domestic corporations of that state, the language being that "no company organized under this act" shall, etc., and, "nor shall any such company," etc. That act does expressly restrict

the operation of domestic corporations, thereafter organized, to one of such classes of risks. Whether from that specified reservation the conclusion is clearly deducible that the general established policy of the state is opposed to the exercise of such privileges by foreign corporations, is not free from doubt. Whether that is the effect of the legislation of New York we cannot settle by any decision we may make. Only the courts of that state can authoritatively determine that. In the absence of any judicial construction of the law by the courts of that state, or of a practical administration of it, in a manner prejudicial to foreign corporations, our retaliatory act should not be deemed applicable if it is felt to be doubtful how the statutes of New York should be construed, even though we might be of the opinion that their probable effect is to restrict the operation of foreign corporations to a narrower field than that allowed to this respondent. We do not, therefore, find it necessary to express our opinion upon the question whether the established public policy of the state of New York forbids foreign corporations to engage in more than one of the several classes of insurance before referred to. It is enough for the purposes of this case that we deem that to be a matter of reasonable doubt. It is not unreasonable to presume that the omission in the act of 1879 to declare, with respect to foreign corporations, the same restrictions which were imposed upon domestic corporations thereafter to be organized was not the result of mere inattention. The omission is so plain, and the expressed restriction so plainly made only in respect to corporations to be organized under that act, that it is manifest that there was no intention to expressly declare the same restriction as to foreign corporations. This omission is more significant when it is considered that, while in the same act (section 14) attention was directed to the conditions to be observed by foreign corporations doing business in that state, there is nothing to indicate a purpose to restrict the scope of the business to one only of these several classes of insurance. Yet presumably the legislature knew that not only by the law of comity, but by the

provisions of this very act, foreign insurance companies were permitted to extend into that state the business for which they had been incorporated, unless that should be prohibited either by direct legislation or by implication, upon grounds of public policy manifest from the general course of legislation. See authorities last cited. It is at least doubtful whether the act of 1884 affects the case. It is not apparent that "the insurance laws" of the state which foreign corporations were required to comply with, before transacting any business there, were intended to embrace a particular statutory restriction as to the scope of the business in which domestic corporations, organized subsequent to the act of 1879, might engage. The effect of the law of 1879 was to limit the purposes for which domestic corporations might be formed to one of the several specified classes of insurance. The act of 1884, as well as that of 1879, recognizes the right of foreign insurance companies to extend their business into that state. In requiring them to comply with the laws of that state it was not intended that they should become reincorporated there with such restrictions as the statutes provided as to the organization of domestic corporations. The foreign corporation was allowed to act and do business under the law of its being, its charter, subject to such regulations as the legislature might impose. The more reasonable construction of the act of 1884, so far as it is here material, is that it required conformity to the laws enacted with respect to foreign corporations, and to those of a more general character, applicable alike to all corporations engaged in the business of insurance. It is not therefore clearly apparent that the laws of New York prevent a Minnesota corporation, chartered for doing insurance business of the several classes in question, from carrying on the same business in that state, and we shall assume that they do not, as we turn our attention to the second of the two questions above stated. If such is the case, there remains but little to decide. For the reasons above given we shall not express what, in our opinion, may be the possible or probable effect of the statute of New York upon the point in

question, considering that if the proper construction is doubtful, the case is not one for the application of our retaliatory law. The provisions of section 6 of the act of 1879 are applicable only to domestic corporations. If foreign corporations, when authorized by their charters, may carry on in New York the several kinds of insurance here in question, we do not think that section 14 should be construed as requiring $100,000 of capital and deposited securities for each of the different classes of risks engaged in. The amount fixed by section 6, as to domestic corporations, is $100,000. Section 14 only requires foreign companies to have "the amount of actual capital required by the sixth section of this act for companies of this state;" that is, $100,000. Nor does the act of 1881 contain anything justifying this proceeding. If a Minnesota corporation, whose charter authorizes it to insure plate-glass, shall undertake to do that one class of insurance business in the state of New York, a deposit of securities to the amount of $100,000 is required to be made in this state. Domestic corporations of the state of New York rest under the same obligation. The fact that this respondent corporation is also lawfully engaged in other kinds of insurance does not affect the case. It is required to make, and has made, the same deposit of securities that our corporations would be required to make. It is therefore our opinion there should be no judgment of ouster against this respondent. Writ quashed.

Note: The statutes of Ill. provide that whenever by the laws of any State Insurance companies of Ill. having agencies in such other state are required to pay, or deposit any fee, tax, or license, greater than foreign companies are required to pay, or deposit under the laws of Ill., then the companies of such state having agencies in Ill. shall pay an equal amount. Held that the law became operative as to such foreign companies on the enactment by the other state of a law requiring such additional payment, and that this would be the result even though there were no companies of Ill. operating in the other state. Union Cen. Life Ins. Co. v. Durfee 164 Ill. 186, 45 N. E. 441.

STATE ex rel. ATTORNEY GENERAL v. FIDELITY & CASUALTY INS. CO. OF NEW YORK.

Supreme Court of Ohio. June 24, 1892. 49 Ohio St. 440.

License—Retaliatory Laws.

Minshall, J. 1. The defendant is a fidelity and casualty insurance company, organized under the laws of the state of New York, and doing, in this state, what, by the laws of New York, is authorized and known as four lines of such insurance, to wit: First, against injury, disablement, or death of persons resulting from traveling or general accidents by land or water; second, guarrantying the fidelity of persons holding places of public or private trust; third, upon plate-glass against breakage; fourth, upon steam boilers against explosion, and against loss or damage to life or property resulting therefrom. Its right to do more than one of such lines of business in this state is challenged by the attorney general on the ground that, by the laws of New York, no company incorporated in this state can transact in that state more than one of such lines of insurance; and therefore, under the provisions of section 282, Rev. St., of this state, it has no right to make in this state more than one of the lines of insurance it is doing. That section reads as follows: "When, by the laws of any other state or nation, any taxes, fines, penalties, license fees, deposits of money, or of securities or other obligations or prohibitions are imposed on insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation doing business within this state, and upon their agents here." A demurrer to the petition, objecting to the jurisdiction of the court as well as to the sufficiency of the pleading, having been overruled, the defendant, as a third defense to the petition, answered: "That under the laws of New York it is legally authorized and empowered to do, and is now doing, the four lines of insurance in that state, which the petition charges it with illegally doing in Ohio; and

that, under the laws of Ohio, a corporation could be legally incorporated and organized with power to do the same four lines of insurance, or any one or more of them, therein, but that no such company has yet been organized to do said four lines of insurance in Ohio and hence no such company has yet made or could make, application to the proper officers in New York for a license to do said four lines of insurance in the state of New York." A demurrer to this defense having been overruled, the plaintiff asked leave to reply in substance as follows: That on January 13, 1887, the requisite number of persons, citizens of Cuyahoga county, "subscribed and acknowledged articles of incorporation," stating therein the name, place of business, and capital stock of the proposed corporation, and its object, to wit, under paragraph 2 § 3641, Rev. St., to do the four kinds of insurance now being done by the defendant in this state; and the same, having been approved by the attorney general as in conformity to the laws of the state, were then filed and recorded in the office of the secretary of state of Ohio, "whereby," it is averred, "an Ohio corporation was duly and legally formed for the purpose of doing the lines of insurance mentioned in the articles of incorporation." As no report has heretofore been made of any of the rulings of the court in the progress of the case, it is proper that two of them should be noticed before passing on the application for leave to reply; that is to say, (1) the jurisdiction of the court, and (2) the sufficiency of the third defense.

1. It is claimed that, as the defendant is a foreign corporation, it cannot be affected by a proceeding in quo warranto in the courts of this state. That it cannot be ousted of the right to be a corporation, or of any of the franchises conferred on it by the laws of New York, is not doubted; but as to such franchises and privileges as are derived from the laws of the state of Ohio it is as much amenable to the courts of this state as an Ohio corporation, and, when found exercising such franchises without authority of law, it may be ousted therefrom, as held in State v. Insurance Co., 47 Ohio St. 167, 24 N. E. Rep. 392, decided since the commencement of this action.

2. Upon the facts stated in the third defense it is claimed that the defendant is not affected by the provisions of section

282, Rev. St., on which the demand of the state is based. The character of this section is relative to its construction. It is claimed to be reciprocal in character, and should therefore be liberally construed. A little reflection will, we think, show that it is not of this nature, but, upon the other hand, retaliatory, and should therefore be strictly construed; or in, other words, not applied to a case that does not fairly fall within its letter. Reciprocity expresses the act of an interchange of favors between persons or nations; retaliation, that of returning evil for evil, or disfavors for disfavors. Accurately speaking, we reciprocate favors and retaliate disfavors. This, then, is a retaliatory statute. It treats the companies of other states as Ohio companies are treated in them; but the moment it is made to appear that Ohio companies are not treated with the same favor in another state that companies of that state are treated in Ohio, a case is made for the application of its provisions, and retaliation follows as a result. It is true that the ultimate object of the statute is to secure reciprocity; but what we have now to do with is not its ultimate, but its immediate, object, and that is to retaliate on the companies of a given state disfavors shown to Ohio companies in the same state.

The question, then, arises, the averments of the third defense being admitted, is a case made for the application of the provisions of the statute to the defendant? We think not. It is admitted that Ohio companies may be, but it is averred that none have been, formed to do the four lines of insurance which the defendant is doing in this state. Hence no case is made for the application of the statute,—the language being: "When by the laws of any other state * * * any * * * prohibitions are imposed upon insurance companies of this state, doing business in such state * * * so long as such laws continue in force, * * * the same prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state doing business in this state." To bring a case within the statutes, there must, at least, be an Ohio company formed to which the prohibitions of the New York statute would apply, should it attempt to enter and do business in that state. It is said that the very reason that there are no such

Ohio companies may be the existence of this New York statute. This is a very remote conjecture, yet, admitting its possibility, it does not vary the language of our statute. If it should be deemed desirable to foster the formation of such Ohio companies to do business in other states, it can easily be accomplished by the legislature making the statute apply where Ohio companies may be, as well as where they are, formed to do such business in other states. We do not believe that any lawyer would affirm that an indictment drawn upon such a statute as this would be good, that failed to aver the existence of an Ohio company to which the discriminating features of the statute of the other state might apply. And there is no reason why a different rule of construction should be adopted in this proceeding. The consequences to the defendant are of a penal nature. If found guilty as charged, it must not only abandon the business it has established, but cease to do more than one of its lines of business in the state, so long as the legislation of the two states remains unchanged.

In construing this statute according to its letter, we have, as we believe, given expression to the intention of the legislature. It is a just compliment to human nature to say that, as a general rule, every man would prefer to have his favors construed largely and his disfavors narrowly; in other words, no one would deliberately do more injury to another than is required by his own interests, and would regard it as an honor to be as generous as he could; and that such are the sentiments of the civilized man is apparent from all writers upon public law. Decisions in some of the other states have been cited which, it is claimed, sustain the construction placed on our statute by the relator. We have examined these decisions, and find none of them upon statutes worded as our own. The case of State v. Fidelity & Casualty Co., 77 Iowa, 648, 42 N. W. Rep. 509 (being the same company defendant in this case), is relied on as in point. By the language of the statute in that state (Iowa) it is put into operation "when by the laws of any other state, any * * * prohibitions are imposed or would be imposed on insurance companies of this state doing or that might seek to do business in such other state." It was there held that through the language of their statute, just quoted, the

existence of the law in another state is sufficient to put the law in Iowa in force, without showing that the state of New York has ever actually enforced its law against an Iowa company. But we submit that this is so by reason of language found in the Iowa statute, and which is not found in our statute; and to give to our statute the same construction would require us to read into it language found only in the Iowa statute. The following cases are also cited as authority: Insurance Co. v. Welch, 29 Kan. 672; State v. Insurance Co., 39 Minn. 539, 41 N. W. Rep. 108; Insurance Co. v. Swigert, 104 Ill. 655; Talbott v. Casualty Co. (Md.), 22 Atl. Rep. 395. The wording of the statute in each case, as before stated, differs from our own; but, if it were otherwise, we should require more cogent reasons than any that have been suggested, to induce us to depart from well-recognized principles of construction, by reading into a statute of this character words not found in its text, for the purpose of giving it a construction in conformity to its supposed policy.

3. The next question is, should leave be given to file the proposed reply to the third defense? We think not, for the reason that it does not show that an Ohio company has been formed to do the four lines of insurance in which the defendant is engaged. It will be observed that it does not aver that any officers or directors have been chosen, or that any of the stock has been subscribed, or that any organization whatever has been effected. It is simply that "artic'es of incorporation" have been made and filed and recorded in the office of the secretary of state. Articles of incorporation do not make an incorporated company; they are simply authority to do so.

Before disposing of the case, it may be well enough to notice another defense, relied on in the answer, and to which a demurrer has been sustained; and that is, the license granted the defendant to do business in this state by the superintendent of insurance. We are all of the opinion that the issuing of a license to a foreign insurance company to do business in this state is a ministerial, and not a judicial, act, and, while it will protect the company in the transaction of its business during its continuance, is not a bar to a proceeding against it in quo warranto, where it is found to be exercising any of the franchises of the state, without authority of law. State v. Insur-

ance Co., 39 Minn. 538, 41 N. W. Rep. 108, and cases cited in brief of counsel for relator.

Application for leave to reply to the third defense of the answer overruled, and petition dismissed.

Accord. State ex rel. Atty. Gen. v. Fidelity & Casualty Co. 39 Minn. 538, 41 N. W. 108.

STATE v. STONE.

Supreme Court of Missouri. Dec. 4, 1893. 118 Mo. 388.

Legislative Regulation.

Burgess, J. This is a suit begun upon an information based upon an affidavit made on April 25, 1893, by C. P. Ellerbe, the then superintendent of the insurance department of the state of Missouri, in which information the defendant is charged with the violation of the second clause of section 5916, Rev. St. 1889, by representing, as agent, certain individuals, and writing for them a policy of insurance, by the terms of which they agreed to indemnify one Emmitt Thoroughman against accident, before said individuals had procured a license to do business in Missouri. The defendant was arrested upon a warrant, was arraigned and pleaded not guilty, and upon the hearing of the evidence was fined $10 and costs. After a motion for a new trial was overruled, and also a motion in arrest, defendant brings the case here by appeal.

The evidence showed that the parties whom defendant represented in procuring this instance were 100 in number, residing in the state of New York, who were conducting insurance upon the manner of the ancient Lloyds; that they individually signed a power of attorney authorizing certain parties to write insurance for them individually and that each policy written was in case of loss to be a charge against them individually, and not jointly, in a sum equal to one-hundredth of the amount of the liability incurred.

* * * * * *

A further contention on the part of defendant is that the state has no right to regulate the business of insurance as conducted by individuals. That the state may impose conditions on corporations doing business in this state that it cannot impose on an individual is well settled, because they are creatures of the law, and have no power or authority to transact any kind of business save and except that authorized by their charters and the statutes under which they are organized. Boone, Corp. § 33; Insurance Co. v. Morse, 20 Wall. 445; Doyle v. Insurance Co., 94 U. S. 535; American Union Exp. Co. v. St. Joseph, 66 Mo. 675; Tied. Lim. p. 281. But, while this is true, it is also true that the state has, by virtue of its sovereign power, the right to regulate all trades, callings, and professions, but it cannot discriminate between citizens of equal standing and merit. There is no pretense that there is any discrimination in the case at bar between citizens of this or any other state. That the state also has the power to require corporations, companies, and individuals who propose to engage in the insurance business to make deposit with the insurance commissioners of a reasonable amount of money or securities to secure their policy holders against loss, seems but reasonable and just. We do not contend that it would have the right to exact a deposit of exorbitant or unreasonable amounts, the effect of which would be to prevent individuals, as well as companies, from engaging in such business. But the statute in this regard we think not unreasonable, and could have no such an effect. As has been said, section 5911 expressly includes individuals, and subjects them to the same provisions as companies and corporations. Section 5916, under which defendant was convicted, prohibits anyone from acting as agent or solicitor for any individual, association of individuals, or corporation in the transaction of insurance business, without such person or persons having first obtained from the superintendent of the insurance department a certificate authorizing him to act as such agent or solicitor, or before such individual, association of individuals, or corporation shall have been duly authorized and licensed by the superintendent of the insurance department to transact business in this state. A violation of this section by the agent or solicitor subjects the offender, upon

conviction, to a fine, imprisonment in the county jail, or both. In a recent opinion delivered by the supreme court of Kansas (State v. Phipps, 31 Pac. 1097), the court says: "It is probable that at this writing every state in the Union has passed laws upon this subject, until it may be said that the right of state regulation of the business of insurance is universally recognized and upheld. * * * The state has power to regulate and control, and to provide penalties for the transgression of its regulating and controlling statutes. If the theory of counsel for appellants ever ripens into authoritative judicial decision, the power of the state to regulate and control the business of insurance within its limits is gone." In Paul v. Virginia, 8 Wall. 168, the statute of Virginia required that every insurance company not incorporated by the state should, as a condition of carrying on its business there, deposit securities with the state treasurer and obtain a license, and another statute made it a criminal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia without such license. Paul, the defendant, acted as agent without a license, and was convicted and fined. The case therefore arose out of an attempt on the part of Virginia to enforce its penal laws for the regulation of the business of insurance within its borders. The court held that such a statute violated no provision of the constitution of the United States, and affirmed the judgment of conviction. To a like effect are Ducat v. Chicago, 10 Wall. 410; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566. To allow the defendant to carry on the business of an insurance agent under the circumstances as developed in this case, without complying with the law in regard to insurance, would be simply licensing him, and those whom he represents, to evade the law, while companies and corporations engaged in the same business have complied therewith. If he, and those whom he represents, desire to engage in such business, they should comply with the law, and, while deriving benefits from such business, bear the burdens imposed upon it by statute. The judgment is affirmed.

Note. The statute prohibited insurance companies from entering into agreements fixing rates, It further provided that if

such agreement entered into any stipulation of the policy relating to the giving of notice or proofs it should be void. Held a proper exercise of the police power. Continental Ins. Co. v. Parks. 142 Ala. 650,—39 So. 204.

Note. Held that the Iowa statute requiring a copy of the application to be attached to the policy, and providing that a failure of the company to so attach, would preclude the company from proving any false statement in such application, was a proper exercise of legislative power. Rauen v. Prudential Ins. Co. 129 Iowa 725.

BARNES v. PEOPLE ex rel. MOLONEY.

Supreme Court of Illinois. Nov. 1, 1897. 168 Ill. 425.

Penalty for Doing Business Without License.

Cartwright, J. The people of the state of Illinois brought this suit in debt against John A. Barnes, to recover the penalty prescribed by the ninth clause of section 22 of the act entitled "An act to incorporate and govern fire, marine and inland navigation insurance companies doing business in the state of Illinois," in force March 11, 1869 (Hurd's Rev. St. p. 880). The declaration contains eight counts, in each of which it is alleged that the defendant acted as the agent of certain persons named therein, who were citizens of the United States and of the state of New York, and resided in the state of New York, and were then engaged in insuring property against loss by fire, by issuing to the owners thereof policies of insurance, and that defendant, as such agent, solicited insurance and delivered the policies set out in the count, and collected the premiums therefor, without having procured from the auditor of public accounts, or insurance superintendent of the State of Illinois, a certificate of authority, stating that the makers of said policies had complied with the requisitions of said act. The policies set out in the several counts were made by persons engaged in the business of underwriters, each of whom was individually liable for a separate amount placed after his name, but not for the whole or any part of another underwriter's liability,

yet all acted together to effect insurance. In such cases the underwriters act through one person, who is the agent of each of them, and policies of this kind are called "Lloyds Insurance." The underwriters in these policies were denominated, "Underwriters at New York Central Lloyds," "Lafayette Fire Lloyds," "Tradesmen's Fire Lloyds," and "Traders' Fire Lloyds of New York." A demurrer, which was both general and special, was interposed to the declaration, and overruled. The defendant electing to stand by his demurrer, and refusing to plead further, the court rendered judgment against him for the penalty of $500.

The question to be determined is whether or not an individual acting as agent for a number of citizens of the state of New York, not a partnership, and not incorporated, who have not complied with the requirements of the act under which this suit was brought, and where the agent has not procured from the auditor of public accounts or insurance superintendent a certificate of authority, stating that such individuals have complied with such requisitions, is liable to the penalty provided by said act. The title of the act, showing its subject and scope, has already been given. The act provides for the formation of corporations to insure property in this state, fixes their minimum capital, and brings all insurance companies previously organized under its provisions, except as to the amount of their capital, the investment of such capital, and their assets, and the privileges and powers granted by their charters. It provides for the organization of corporations of two kinds, viz. joint-stock companies and companies organized on the mutual plan; and the auditor has no power, under the laws of this state, to issue a license to a company of a different character. Insurance Co. v. Swigert, 120 Ill. 36, 11 N. E. 410. It declares that all companies incorporated or extended under it shall be deemed and taken to be bodies corporate and politic, in fact and in name, and shall be subject to all the provisions of law in relation to corporations, so far as the same are applicable. It requires an annual statement under oath of the amount of capital or stock actually paid in, the property or assets held by the company, the liability of the company, its income during the preceding year, and its expenditures during

the same time. The twenty-second section fixes the conditions upon which foreign insurance companies may take risks or transact the business of insurance in this state; and it is therein provided that it shall not be lawful for any insurance company, association, or partnership incorporated by or organized under the laws of any other state of the United States or any foreign government, for any of the purposes specified in the act, to transact any insurance business in this state, except upon the condition therein fixed. The amount of capital must be equal to that required of similar companies formed under the act. The company must first appoint an attorney in this state, on whom process of law can be served. A copy of the charter or deed of settlement of the company must be filed. A statement, under the oath of the president or vice president and secretary of the company, showing its financial condition, must be filed. If the company is incorporated by, or organized under, any foreign government, it must deposit $200,000. And in all cases a certificate of authority must be procured from the auditor, stating that the company has complied with all the requisitions of the act which apply to said companies, and giving the name of the attorney appointed to act for the company. The provisions of the act, unless in one instance, relate only to insurance companies, and not to an individual engaging in that business. And in People v. Fesler, 145 Ill. 150, 34 N. E. 146, it was said that the provisions of section 22 were aimed against foreign insurance companies attempting to do business in this state, and that an agent could only be made liable by acting for an insurance company, association, or partnership incorporated or organized under the laws of some other state or foreign government. That such is the general purpose of the act, cannot be doubted. The reliance of the attorney general, however, is placed upon a provision contained in the eleventh clause of said section 22. That is the only provision contained in the statute which includes individuals in the regulation of the business, and it is expressly limited by its terms to that section alone, and applies only to foreign individuals. It is as follows: "The provision of this section shall apply to all foreign companies, partnership associations and individuals whether incorporated or not."

From this provision it is argued that the word "company," as used in all the paragraphs of the section, is not to be taken in its ordinary sense, but includes individuals as well as corporations and associations incorporated by or organized under the laws of any other state or any foreign government. As the provision relates only to that section, if it has the effect claimed it operates upon foreign individuals alone, and imposes a restriction on the citizens of other states not imposed upon citizens of this state.

Insurance is an agreement by which the insurer, for a consideration, agrees to indemnify the insured against loss, damage, or prejudice to certain property described in the agreement, for a specified period, by reason of specified perils. For a long period of time this business was conducted by individuals alone, both in England and in this country, and at common law any person might properly enter into a contract to indemnify another against loss by fire. An individual, unless he may be prevented by statute or public policy, may still lawfully enter into an undertaking of that kind. 11 Am. & Eng. Enc. Law, 281; Ang. Ins. 43; Park, Ins. 5; Wood, Ins. 2; May, Ins. 34. There is nothing in the statutes of this state prohibiting a citizen of the state from transacting insurance business, or abridging or restricting such privilege. There is no statute with which he must comply in order to transact such business, but such restrictions as are imposed relate to insurance corporations organized under the stock or mutual plan. The right of the individual to engage in that business is recognized in Green v. People, 150 Ill. 513, 37 N. E. 842, and it is there practically admitted by the declaration that they must act upon their responsibility as individuals. It is unquestioned that this state may prescribe conditions under which foreign insurance corporations may be permitted to do business here. A corporation exists only by virtue of the law creating it, and has no existence beyond the boundaries of the state where such law has force. It cannot exercise any rights or privileges in a foreign jurisdiction, unless permitted to do so by express or implied permission of the foreign state, and it is on the principle of comity that states permit corporations of other states to act within their boundaries. Corpora-

tions are not citizens, within the meaning of the constitution of the United States guarantying equal privileges and equal protection of the laws. Paul v. Virginia, 8 Wall. 168; Pembina Con. Silver Mining & Milling Co. v. Pennsylvania, 125 U. S. 181, 8 Sup. Ct. 737; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 10 Sup. Ct. 958; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207; Elliott, R. R. § 30. The decisions as to corporations do not apply to natural persons, who are entitled to the privileges and immunities of the citizens of the several states. The constitution of the United States assures to the citizens of other states the right to pursue such lawful businesses and callings within this state as citizens of this state may pursue. Section 2 of article 4 of that instrument provides, "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" and the fourteenth amendment provides, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction, the equal protection of the laws." If the citizens of this state may, without restriction, enter into contracts of insurance, the same right is guarantied to the citizens of other states. The provision in question is against the citizens of other states, merely and solely because they are not citizens of this state. It draws a line between them and our own citizens, based on residence, and abridges a privilege freely allowed to our own citizens. The constitutional safeguard protects the citizens of other states against unequal legislation of the character which forbids to them the privilege of pursuing such lawful occupations as are permitted to the citizens of this state. If, as contended, the provision is intended as a police regulation for the protection of citizens of this state from irresponsible underwriters acting individually, and without incorporation or organization under any law, the same necessity applies in the case of the irresponsible and conscienceless underwriter who is a citizen of this state. If the business of insurance, on account of its importance and nature, is a proper subject for the exercise of the police

power, such power must extend to, and operate upon, the citizens of this state and other states equally. A discrimination directed only against underwriters residing without the state is invalid.

It is argued that the requirement for the appointment of an agent in this state, upon whom service can be had, may be properly enforced against a foreign underwriter, and that such a requirement is not a discrimination, since service may be had here upon the underwriter who is a citizen. In considering the question of the constitutionality of the eleventh clause, we have thus far assumed that it had the full force and meaning claimed for it by the attorney general; but it is apparent that there are requirements against foreign corporations in the act with which an individual could not comply, and which could not be applied to him. He can have no charter nor deed of settlement to be filed, no president nor vice president nor other chief officer of himself, who can make the statement under oath, and he cannot by any process become similar to a corporation formed under the provisions of the act. Taking the first and second clauses, relating to the appointment of an agent, together, it is plain that they provide for a method of service on a corporation, and cannot be applied to an individual. If the legislature can provide that no citizen of another state shall engage in commercial, mercantile, or other business in this state without being compelled to appoint an agent on whom service can be had here, it has not been attempted in this case. The demurrer should have been sustained, and the judgment will be reversed and the cause remanded. Reversed and remanded.

See People v. Loew 44 N. Y. Supp. 42. Holding that the laws of 1892 (N. Y.) impliedly provided that insurance business should be conducted by corporations only.

HAYNE v. METROPOLITAN TRUST CO. et al. (Two cases).

Supreme Court of Minnesota. 1897. 67 Minn. 245.

Insurance Commissioner. Power. Recision. Credit Insurance.

Mitchell, J. Two demurrers to the complaint were interposed,—one by the Metropolitan Trust Company (which we will hereafter call the "Trust Company") on the ground that it did not state a cause of action; and the other by the state auditor, Dunn, on the same ground, and on the further ground that the court had no jurisdiction of him. The court overruled the demurrer of the trust company, and sustained that of Dunn on the second ground. The essential allegations of the complaint, stated briefly and according to their legal purport, were as follows: The National Credit Insurance Company (which we will hereafter call the "Insurance Company") was a domestic corporation engaged in the business of insuring against losses resulting from the insolvency of those to whom the insured had sold goods on credit. In February, 1893, pursuant to Gen. St. 1894, §3332, it assigned to and deposited with the insurance commissioner, in trust for the benefit of its policy holders, a note and mortgage executed by one Maxcy, for the amount and of the actual value of $114,000. Subsequently, during the years 1893, 1894, 1895, it issued a large number of policies, upon which it was at the time of its failure, in September, 1895, and still is, indebted to the holders over $125,000. In January, 1895, without the knowledge of the policy holders, the insurance company and the trust company (which had knowledge of all the foregoing facts) made and carried into effect an agreement by which the former assigned to the latter the Maxcy note and mortgage in exchange for notes and other securities of the face value of $104,000, but of a much less actual value, which the trust company assigned to the insurance company. At the same time, and as part of the same transaction, the two companies withdrew the Maxcy note and mortgage from the insurance

commissioner, and the insurance company substituted in place thereof a part of the securities which it had received from the trust company, and, in addition thereto, an amount of the capital stock of the latter company which it had issued to the former. These substituted securities were of the face value of about $104,000, but were in fact of a much less actual value. The remainder of the securities received by the insurance company in this exchange (of the face value of $18,000) were retained by it, and not deposited with the insurance commissioner. The state treasurer never countersigned or approved of the reassignment and surrender of the Maxcy note and mortgage, or the substitution of other securities in place of them, and never consented to, or had notice of, such attempted transfer, surrender, and substitution. Subsequently the trust company assigned and delivered the Maxcy note and mortgage to the state auditor, who still has possession of them. It is not alleged for what purpose this assignment was made, except that it was made "in part, at least, for the benefit of the trust company itself." All of this was done without the knowledge of the policy holders of the insurance company. In September, 1895, the insurance company, being insolvent, made an assignment for the benefit of creditors. Its assets, exclusive of the securities on deposit with the insurance commissioner, are almost nominal, not exceeding $5,000. In an action subsequently commenced by the insurance commissioner and one of the policy holders on behalf of all the policy holders of the insurance company, the plaintiff was appointed receiver for the purpose of converting all securities deposited with the insurance commissioner in trust for the benefit of policy holders into money and distributing the proceeds. In order to carry this purpose into effect, he was given power to take possession of all such securities, and to bring such actions as might be necessary for that purpose. He demanded of both the trust company and the state auditor a delivery to him of the Maxcy note and mortgage, and at the same time tendered to the trust company all of the securities which it assigned to the insurance company, and which the latter had deposited with the insurance commissioner. This tender did not include the securities (of

the face value of $18,000) which the insurance company itself retained, and never deposited with the insurance commissioner. Of course, neither these securities nor their proceeds have ever come into the hands of the plaintiff. The demand being refused, the plaintiff brought this action, alleging in his complaint his continuing willingness to restore to the trust company a'l of the securities which have come into his possession.

We have eliminated from this statement all the allegations of the complaint of actual fraud and fraudulent representations on part of the two companies to induce the insurance commissioner to surrender the Maxcy securities, and accept other securities in place of them, for the reason that these allegations are not essential to the plaintiff's cause of action. The policy holders of the insurance company were the beneficiaries of the trust, and, to the extent necessary to satisfy their policies, were the equitab'e owners of the Maxcy note and mortgage. They never consented to the exchange of securities. The insurance commissioner had no authority to consent to any exchange, or to surrender the trust property, except with the consent and approval of the state treasurer, expressed in the manner provided by statute. Gen. St. 1894, § 3155. He was merely the custodian of the property, vested with the bare legal title in trust for the policy holders. The trust company had or was chargeable with notice of these facts. From a legal standpoint, the facts present a case where one person has unlawfully and knowingly taken the property of another, and deposited it with a third person. The law of the case would have been the same if the two companies had feloniously abstracted the securities from the office of the insurance commissioner, and one of them had subsequently deposited them with the state auditor. And for the same reason this is not an action to rescind a voidable contract on the ground of fraud, as counsel for the defendants argue. The transfer and surrender by the insurance commissioner of the Maxcy securities were absolutely void. So far as the policy holders, or this plaintiff, who sues in their behalf, is concerned, there is nothing to rescind, and the law of rescission has nothing to do with the case. The policy holders were no parties to the arrangement by which the two companies exchanged se-

curities and secured the surrender of their trust fund by the insurance commissioner, and the acceptance by him of something else in its place. They are merely seeking, through the plaintiff, as an officer of the court, to recover what is and has been all the time their property. On securing this, they are ready and willing to surrender to the trust company all of its securities which were deposited by the insurance company with the insurance commissioner. But on what principle of law or equity can they be required to make good or restore to the trust company those securities which have never come into their possession, and from which they have received no benefit. The trust company went into the transaction with its eyes open, and unlawfully dealt with property held in trust for the benefit of others. Under such circumstances it has no right to insist that it shall be made whole at the expense of the trust fund belonging to the policy holders. The plaintiff is required to do equity by returning such securities as have come into his hands, but that is upon a very different principle from the doctrine of rescission. The fact that the Maxcy note and mortgage exceeded the minimum amount of deposit required by statute (Gen. St. 1894, § 3332) is not material. The excess was as fully bound by the trust as the balance. Insurance Co. v. Maxwell, 131 N. Y. 286, 30 N. E. 192.

It is contended, however, that the kind of business which the insurance company was doing was prohibited by Gen. St. 1894, § 3157, and therefore its deposit with the insurance commissioner was unauthorized, and could be withdrawn at pleasure. The section referred to in its original form was section 1, tit. 3, c. 1, Gen. Laws, 1872, which was a codification and revision of the insurance laws of the state, the provisions of which related exclusively to fire, life, and marine insurance. Assuming, without deciding, that it prohibited other kinds of insurance, they were clearly authorized by Gen. Laws 1881, c. 123 (Gen. St. 1894, §§ 3331-3337, inclusive), entitled "An act to authorize and regulate within this state, the business of insurance other than fire, life and marine." We think this act is broad enough to authorize any kind of insurance that is not against good morals or public policy. Gen. Laws 1891,

c. 94 (changing section 3157 to its present form), was an amendment of, and a restriction upon the operation of, the act of 1872, and was never intended to repeal the numerous acts on the subject of insurance which had been passed in the meantime since 1872. Section 3157, among others, was quoted in Seamans v. Mill Co. (Minn.) 68 N. W. 1065, cited by counsel, merely with reference to the authority of fire insurance companies. What is said in the brief of counsel as to the standing and powers of the receiver is predicated upon the erroneous assumption that this is an action for rescission, and is sufficiently answered by what has been already said on that subject. Aside from the possible power to receive payment at maturity, the insurance commissioner has no power except to hold the securities as custodian. He cannot administer the trust. That has to be done by the court. The court, through its receiver, is seeking to lay hold of the trust fund for the purpose of administering the trust according to law. The complaint states a cause of action.

2. The defendant Dunn, in support of his contention that the court has no jurisdiction over him, relies on a line of decisions of this court commencing with Rice v. Austin, 19 Minn. 103 (Gil. 74), and ending with State v. Barden, 40 Minn. 174, 41 N. W. 817, to the effect that the courts cannot control or interfere with an executive officer of the state in his official acts. This court has undoubtedly gone further than any other in holding executive officers of the state exempt from the control of the courts in the performance of their official duties. This is especially true as to executive officers other than governor. It will be found, however, that in many of these cases what was said went further than what was decided. Whether our decisions on the subject ought to be modified, we have no occasion to consider now, for the reason that they are all clearly distinguishable from the present one. It will be found that in every one of these cases the state, as such, was interested. Some of them were suits to recover money or property from the state of which it was owner; others were brought to determine adverse claims to property claimed by the state, or to compel specific performance of the statutory contracts of the state; and still others to prevent a state officer from

paying out the money of the state upon obligations of the state alleged to be void. But this case involves only private rights in private property which is in the possession of a state officer, but in which the state, as such, never had, and never can have, any shadow of right of property. The court is not asked to compel the state auditor to perform any official act that can affect the interests of the state. All that is asked of him is that he turn over this trust fund to the court, so that it may be administered in accordance with the provisions of the trust to which it has been devoted. It cannot be that because this trust fund in which the state has not a dollar's interest, happens to be in the possession—and unlawfully at that—of an executive officer of the state, he can refuse to surrender the property, continue to hold it unlawfully, and thus deprive the policy holders of what belongs to them, and yet the courts can give them no relief, because an executive officer of the state is not subject to the control of the judicial department of the state government. We are confident that no case can be found in the books which goes to the extent of holding any such doctrine. Our conclusion is that, as respects the control and disposition of this trust fund for the benefit of policy holders, the state auditor is subject to the jurisdiction of the courts. On the appeal of the trust company the order appealed from is affirmed, and on the appeal of the plaintiff the order appealed from is reversed.

Note. A foreign insurance company entered into an agreement with its local agent in which it was provided that the local agent should retain a per cent of the premiums on all business transacted by them, the amount so retained to be held in trust for the benefit of the policy holders given insurance through the local agent. A contest arose between the policy holders entitled to the trust fund under the agreement and other policy holders of the company. Held, that the agreement was valid and that the policy holders who had effected their insurance through the local agents were entitled to the funds created under the agreement. Babcock Printing Press Mfg. C. v. Ranous. 164 N. Y. 440, 58 N. E. 529.

STATE ex rel. NATIONAL LIFE ASS'N OF HARTFORD, CONN., v. MATTHEWS, State Superintendent of Insurance.

STATE ex rel. HOME MUT. LIFE INS. CO. v. SAME.

Supreme Court of Ohio, March 1, 1898. 58 Ohio St. 1.

Powers of Superintendent of Insurance.

Petitions by the state of Ohio, on the relation of the National Life Association of Hartford, Conn., against W. S. Matthews, state superintendent of insurance, and by the state of Ohio, on the relation of the Home Mutual Life Insurance Company, against W. S. Matthews, state superintendent of insurance, in mandamus, to compel issuance of insurance certificates. The cases, being heard together, are decided in one opinion. Writs of mandamus refused, and petitions dismissed.

Bradbury, J. These two actions were brought in this court, by the respective relators, against the superintendent of insurance of this state, to compel him to issue to them, respectively, a certificate authorizing each of them to transact the business of life insurance within this state, under section 3630e, Rev. St., that prescribes the conditions upon which life insurance companies, organized under the laws of other states, etc., may be permitted to transact the business of life insurance on the assessment plan within this state. The superintendent of insurance, contending that the method of insurance pursued by these companies, respectively, was not according to the assessment plan, declined to issue the certificate demanded of him.

In respect of the National Life Association of Hartford, Conn., the refusal to grant a certificate rests on the additional ground that it had refused to pay the taxes which the superintendent of insurance claimed were assessable against it by virtue of section 2745, Rev. St. This section of the statute expressly authorizes the superintendent of insurance, in case "such company refuse to pay said tax, after demand therefor has been made," to "revoke the license of such company to do business in this state." If, upon this ground,

he may revoke a license previously issued, it would seem to unquestionably follow that he may also, upon such ground, refuse to issue or renew such license to the defaulting company. An action brought by the superintendent of insurance to recover this tax is pending in the court of common pleas of Franklin county. This effort, however, to recover, according to the ordinary course of justice, through the instrumentality of the courts, the amount claimed to be due from the relator as taxes, does not suspend the power of revocation explicitly given by the section above cited. Even if this power of suspension should be regarded simply as an additional and summary remedy for such default, it ought not, in the absence of a legislative intention to that effect, to be held to require the state, through its officer, to elect between the two remedies. And certainly there is nothing in the statute, or in the nature of the proceedings in the courts to recover the amount already payable, to indicate that the legislature intended that the authority thus conferred on the superintendent of insurance should be held in abeyance during the pendency of such action. However, as the taxes claimed to be due from the relator rest on the assumption that it is not engaged in the business of insurance on the assessment plan, the right to revoke its license must stand or fall upon the determination of that question. If it is transacting business on the assessment plan, then the taxes in controversy were not legally assessable against it, and its refusal to pay them would not justify a revocation of, or refusal to renew, its license.

Both relators are bodies corporate,—the first named, the National Life Association, being organized under the laws of the state of Connecticut; the other, under the laws of the state of Michigan. An inspection of their respective charters shows that their schemes of organization widely differ. The charter of the National Life Association, as far as material to the consideration of any matter before the court, reads as follows:

"Sec. 2. The capital stock of said corporation shall not be less than one hundred thousand dollars, and may be increased as herein provided, from time to time hereafter, at

the pleasure of said corporation, to any further sum not exceeding five hundred thousand dollars; and each share of said capital stock shall be one hundred dollars; * * * provided that no stockholder shall be liable to said corporation for any claims against the same, nor shall the stockholders, or any of them, be liable in any event beyond the amount of their stock owned by them respectively for any losses whatever. * * *

"Sec. 3. The capital stock of said corporation shall be personal property, and transferable on the books of said association in conformity with its by-laws."

"Sec. 5. * * * The affairs of said corporation shall be managed and conducted by not less than seven nor more than eighteen directors, a majority of whom shall reside in this state, and shall be elected on the second Tuesday in January in each year by the stockholders from among their number. * * * Every officer or director shall be a bona fide stockholder of at least five shares of said capital stock before he shall be qualified to act as such officer or director.

"Sec. 6. Notice of every stockholders' meeting shall be given ten days previous to such meeting in one or more newspapers printed in the city of Hartford. At all such stockholders' meetings no business transacted shall be legal unless a majority of the stock is represented. Each stockholder shall be entitled to one vote for each share of stock held by such stockholder. * * *"

These provisions of its charter show conclusively that it is a corporation created for profit. It has a capital stock of $100,000, divided into shares of $100 each, which capital stock may be increased to $500,000 and similarly divided. These shares are declared to be personal property, transferable on the books of the "association in conformity with its by-laws." The ultimate power to manage its affairs is lodged in its stockholders, to the entire exclusion of its policy holders; for the right to attend corporate meetings, as well as to elect its officers, is vested solely in the former. Whatever net profits may accrue from its business will ultimately go to its stockholders, the policy holders having no interest therein; the rights of the latter being measured by the contract

evidenced by their respective policies. It is true that, in an agreed statement of facts submitted to the court, it is stated that: "The plaintiff pays a dividend of 6 per cent. per annum on the amount of stock actually paid into its treasury; the same being paid out of moneys raised and used by it for expense purposes, and the amount thereof being $3,000 per annum." We do not see how this bears upon the question of the character or nature of the concern. There is nothing in its charter to prevent the payment of a larger dividend, if the earnings of the company at any time would warrant it, or to prevent its setting aside or investing its accumulation in any way it may choose for the eventual benefit of its stockholders.

Counsel for defendant strenuously contends that a corporation of the character of the relator—that is, one possessed of a capital stock and created for the profit of the holder thereof—cannot transact the business of life insurance in Ohio on the assessment plan. This contention he rests on a fundamental distinction claimed to exist between the different classes of life insurance companies; the object of one class— that to which the relator belongs—being to make profit for its stockholders, while the other class, composed of those doing business on the "assessment plan," so-called, is not designed for profit at all, and in fact can have no stockholders among which to divide profits. Without setting forth our statutes that authorize and regulate the creating of life insurance companies, it may be said of them that, while they do not speak to this question with perfect precision, yet, as respects Ohio corporations, many of their provisions seem to conflict with the notion that a stock company can do business on the assessment plan. These statutes divide life insurance companies, other than fraternal, into two classes, into one of which it places those companies that have a capital stock, or, at least, capital, and into the other class such as do not have either capital stock or capital. The general powers of the former class are granted by section 3587, Rev. St. The things that may be done by the latter class are set forth in section 3630, Id. By the former section (3587) authority is given "to make insurance upon the lives of individuals and every insurance appertaining thereto or connected therewith on the mutual or stock plan, and grant, purchase or

dispose of annuities." By the latter section (3630) a company or association may be organized to transact the business of life or accident, or life and accident insurance on the assessment plan, for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the families, heirs, executors, administrators or assigns of the deceased members of such company or association, etc. The powers of a company belonging to the first class are unlimited as to the individuals it may insure, but are limited to insuring on the "mutual or stock" plan. Section 3587. A company or association belonging to the second class can only insure the life of a member of the company, and its business must be transacted "on the assessment plan." As the insured, by the act of insurance under this plan, becomes a member of the insurance company, and as there are no special restrictions respecting the persons who may apply for insurance and consequent membership, except as to the age and health of the applicant, the powers of the two classes in this respect do not greatly differ. But, as respects the structure of the companies that compose them, and the method by which they do business, the two classes fundamentally and radically differ. One class has a capital stock, or capital, and, of course, stockholders, or members who have contributed to its capital, for whose profit its business is primarily conducted, while the other has neither. The business of the first class is done none the less for the benefit of its stockholders, or members, because some of the companies which compose it,—perhaps all of them, now,—with a view to attract patronage, uniformly issue policies which stipulate that the holder shall share in the profits of the concern. The companies that compose the first of the classes are empowered to transact business on the mutual or stock plan; the other, only on the assessment plan. There may be some other minor distinctions between the two classes, but these are the chief ones. The two classes together seem to cover the entire field of general life insurance, and we think, in respect to Ohio companies, this field was designedly divided by the legislature between these two classes, and that the inference to be drawn from this legislation is that the portion assigned to each was intended for

its exclusive occupation; and therefore an Ohio life insurance company must confine its transactions to such methods of insurance as pertain to the class to which it belongs. However improbable the supposition may be that men would invest their money in a concern the business of which was prohibited by law from returning any profit on the investment, yet there is nothing in the nature of life insurance on the assessment plan to forbid its being transacted by a corporation possessing capital stock, and having stockholders or members contributing to its capital, by whom its affairs are exclusively controlled. If the general assembly of Ohio, in the exercise of its legislative discretion, chooses to vest this power in corporations to be organized with capital stock and stockholders, and men elect to organize such corporations and invest their capital therein, we know of no principle on which the exercise of this power could be prevented by an appeal to the judiciary. It might be claimed, with some show of reason, that, if the charter of such a corporation and the statutes under which it was organized limited the benefits that might accure to its stockholders to lawful interest on the amount actually advanced for stock, it ought not to be held a corporation for profit, and that, while the stockholders were nominally such, their beneficial relation to the company would rather be that of creditors. However this may be, it is speculative, and the subject will be dismissed with the remark that it lies within the province of the legislative, and not of the judicial, branch of the government.

Counsel for relator, in an interesting discussion of the evolution of life insurance, shows that what is called "old line insurance" has in recent years been materially modified by the application to its original methods of insurance of some of the principles and practices that underlie insurance on the assessment plan, and also that, within the last decade or two the crudities of the latter plan have been systematized and improved by the adoption of a portion of the features of the former. That the two plans have been steadily drawing nearer to each other in recent years; that some of their distinctive features have become obliterated,—is true; and doubtless the causes that have produced that result are still in active operation. Our statutes do not seem to recognize, to the extent

claimed, these evolutions; and, notwithstanding what may have been accomplished in this way in the sphere of general life insurance, or however near they may have drawn to each other in their methods of transacting business, those statutes quite clearly recognize three distinct methods in which it still may be done. Two of these methods, that upon the stock plan and that upon the mutual plan, are mentioned in section 3587, Rev. St.; while reference to the third method, that upon the assessment plan, is found in section 3630, Id. We have already seen that life insurance companies created under section 3587, Id., and which are required to have capital stock, or fixed capital, at least, cannot transact life insurance on the assessment plan; that the reason why they cannot thus transact life insurance is because the general assembly has not granted that authority to them, and is not founded on any incapacity, on account of the mode in which they are organized, to receive and exercise that power; on the contrary, that, if the general assembly chooses to confer on life insurance companies, organized under section 3587, the power to insure lives on the assessment plan, the exercise of such power would be unobjectionable. The power of a corporation, however, depends on its charter and the laws of the state where it is organized; and, although it may be true that our statutes do not authorize stock companies created under them to transact life insurance on the assessment plan, it does not follow that life insurance companies created in other states cannot be clothed with such power by their charters and the laws of the state in which they were organized. Whatever powers the relator the National Life Association of Hartford possesses in this respect is found in section 4 of its charter, which is in the following terms: "Sec. 4. Said corporation is authorized and empowered to make insurance upon the lives of individuals, an to make contracts upon any and all conditions appertaining to or connected with life risks of whatever kind or nature, and to grant annuities. and policies may be issued stipulated to be with or without participation in the profits." This grant of authority is very broad, and, while the object of the concern is, doubtless, ultimate profit for its stockholders, nevertheless, if, under the power thus conferred, the relator, without objection from its

stockholders, sought to engage in the business of life insurance in this state on what is clearly and unequivocally the assessment plan, as that is recognized by the statutes of this state, and complied with the conditions prescribed in section 3630e, Rev. St., what ground would be assigned as a valid reason for denying it admission to transact business under that section?

That the relator the National Life Association of Hartford has complied with the formal conditions prescribed by section 3630e, Rev. St., necessary to entitle it to a license under that section, is admitted, and, as we have seen, the powers conferred by its charter warrant it to transact life insurance on the assessment plan. The only remaining question is whether the scheme of insurance it pursues, or proposes to pursue, within this state, is according to the assessment plan, as that phrase is used in our statutes.

The relator, in the course of its business in this state, has issued five different forms of policies. They do not materially differ as respects the matter now under consideration. One of them is given:

"The National Life Association of Hartford, Conn.
"Amount,———. Premium,———

"In consideration of the written and printed application for this policy, and the warranties contained therein, together with the conditions and agreements on the back hereof, which, taken together in their entirety, constitute this contract, and of the payment of the premium of $——— at the home office of the association in Hartford, Connecticut, to be evidenced by the receipt of the association, and a payment of a like sum to be made at said office on or before 12 o'clock noon of the ——— day of ——— in every year during the continuance of this contract, this association does hereby insure the life of ——, of ——, county of ——, state of ——, in the amount of —— dollars (less any indebtedness due the association by the insured or beneficiary), to be paid at the home office within ninety days from receipt of satisfactory evidence at the office of the association in Hartford, Connecticut, as required by it,

upon blanks furnished, of a valid claim, conditioned upon the death of the insured from any cause assumed under the terms of this contract, to ——, if living; otherwise, to the legal heirs or assigns of the insured. In witness whereof," etc.

The "privileges and agreements" on the back of the policy, to which reference is made, so far as material are as follows:

"Privileges and Agreements.

"This policy shall participate in profits as hereinafter provided, which shall be apportioned at the expiration of the accumulation period. If living, and all premiums have been duly paid, the insured shall be entitled to select one of the following benefits: First, To withdraw all surplus standing to its credit, and continue this policy in force for the original amount, on payment of stipulated premiums, either in (1) cash; (2) paid-up insurance; (3) annuity. Second. To surrender this policy for its full value, consisting of the entire reserve, together with all surplus accumulations then apportioned by the association, either in (1) cash; (2) paid-up insurance; (3) life annuity. The accumulation period under this policy ends on the —— day of ——, 19—, at which time the results are estimated at $—— in cash, or $—— in paid-up insurance. Should the insured elect to continue the policy beyond the accumulation period, dividends thereon shall thereafter be apportioned annually, to be used in reduction of premiums: Provided, that, in all of the preceding privileges, the amount therein referred to shall not conflict with the statutory requirements of any state in which the association is at the time doing business. After this policy has been in continuous force three full years, it may be exchanged for a non-participating paid-up policy, provided written application be made for the same while there is no default in the payment of any premium. Paid-up insurance will in no case be given for a larger amount than the original policy, unless the insured shall furnish evidence satisfactory to the association that he is then in an insurable condition. If at any time the proportion of funds credited to this policy (which, together with the en-

tire assets, are hereby pledged for its payment) shall not equal the reserve calculated according to the Actuaries' Mortality Table with interest at 4 per cent., then this policy may be charged with its share of such deficiency, which, at the option of the executive committee, shall be payable in cash, or be charged as interest-bearing premiums. The expense charged on this policy during the first year shall be the installments specified, and thereafter three-fifths of 1 per cent. annually of its face value, and the expenses incurred in protecting and investing the funds of the association. Premiums are payable annually in advance; but if, for convenience of the insured, the same are paid semi-annually or quarterly, the balance of any annual premium will be deducted in case this policy becomes a claim."

An examination of sections 3604 and 3630e, Rev. St., before referred to, show that, for the purpose of granting certificates of authority to transact the business of life insurance in this state, the general assembly has divided life insurance companies created under the laws of other states into such as insure lives on the assessment plan and such as do not. And while, as we have seen, supra, the powers of a corporation of this kind, and the scheme of insurance it may pursue, must be ascertained by an inspection of its charter, nevertheless, when it seeks a license to transact business in this state, the question whether that scheme falls within one or the other of those two classes must be determined according to our own laws. This division of life insurance companies, organized under the laws of other states, made for the purpose of providing for their admission in this state to transact business, distinctly appears for the first time in the statute of April 18, 1883 (80 Ohio Laws, p. 180). Under that statute life insurance companies, created under the laws of other states, that transacted business on the assessment plan, were admitted into this state on terms that were much more liberal than those extended to such companies as did not pursue that plan. Section 3630e of the act of 1883 (80 Ohio Laws, p. 180), above referred to, which prescribed the terms under which life insurance companies of the former class might be admitted into this state, did not require of them either fixed capital or a deposit of any sum of money whatever

as a condition to their admission; while, by the provisions of sections 3604, 3605, Rev. St., all other life insurance companies organized in other states, as conditions to admission herein, were required to possess a prescribed capital, and to deposit with the superintendent of insurance, for the beenfit of its policy holders, securities to at least the sum of $100,000. Doubtless the chief consideration that led to this classification, and consequently to granting to assessment companies admission upon more liberal terms as to capital than were prescribed in respect of other life insurance companies of other states, were that the former, relying upon post mortem assessments to meet specific losses as they should occur, the possession of a fund accumulated for that purpose would not be necessary to the security of a policy holder, while, in respect to the other class,—those that exacted the payment of a premium in advance, and must rely wholly upon accumulations of capital already made to pay losses,—the security of their policy holders demanded that they should possess capital securely invested and exclusively devoted to that object. Certainly these considerations are sufficient to account for the classifications made, and for the difference in the terms prescribed to the members of each class as conditions for admission to transact business in this state, and one entitled to considerable respect in construing the statute, and, in a doubtful case, might be decisive.

There is, however, little if any ambiguity in the statute of 1883 (80 Ohio Laws, p. 180) in this respect. Section 3630e, Rev. St., as then passed, clearly made the transaction of business "on the assessment plan" the test of admissibility under its provisions. If a life insurance company, organized in another state, did not insure according to that plan, it was not entitled to admission under that section (3630e), but must resort for that purpose to sections 3604 and 3605, Rev. St. Manifestly, this phrase relates to the method by which the revenue of an insurance company is to be raised, or (which is the same) to the mode in which the company exacts from its po'icy holders the consideration to which it is entitled on account of the obligation or risk which it assumes on issuing a policy. In this connection it should be held to mean something specifically different from "premium," for it is used in

contradistinction to the latter word. Our statutes do not define the word "premium," nor do they declare the meaning of the phrase "on the assessment plan." But the general assembly should be deemed to have used these terms in the sense in which they were understood at the time the statute was enacted. If, in the subsequent growth and development of life insurance, the different plans on which it is transacted have lost most of their distinctive features, it would not at all affect the construction of the statute. Section 3630e of the statute of 1883 (80 Ohio Laws, p. 180), however, was amended in 1891 (88 Ohio Laws, p. 252). The section as then amended is now in force, and differs from the section it superseded in a number of quite important provisions. The right to a license under the amended section depends upon specific conditions that the section it superseded did not contain. The fifth of these conditions requires of a life insurance company seeking a license under it to show that it "is paying, and for the twelve months next preceding has paid, the maximum amount named in its policies or certificates." The sixth condition is to the effect that it must show that the "liabilities of the assured or members are not limited to fixed or artificial premiums," while the seventh condition requires that it shall have accumulated and securely invested a fund "not less in amount than the proceeds of one periodical payment by or assessment on all certificates or policy holders," etc. The extent to which these conditions impliedly modify the method of raising funds, as contemplated by the phrase "on the assessment plan," as originally used, is difficult to determine. The sixth condition, by requiring the company to show that it does not rely solely on "fixed or artificial premiums," would indicate that it might raise part of its revenue in that way. The provision of the seventh condition, that it shall maintain and invest a fund "not less in amount than the proceeds of one periodical payment by or an assessment on all certificates or policy holders," points in that same direction. These provisions seem to contemplate that a scheme of life insurance, according to which a portion of the fund designed to pay losses may be raised by fixed periodical payments, would not be incompatible with the "assessment plan" of insurance.

However this may be, as long as the legislature retains this classification of life insurance companies for the purpose of granting to them permission to transact business in this state, the courts must regard it as substantial, and founded on some clearly understood and material features, wherein the two classes differ from each other. The retention of the classification would otherwise be unaccountable. This difference, we have shown, relates solely to the method in which a company exacts payment from a policy holder for the hazard it assumes by issuing a policy. The one class exacts premiums, or a fixed sum, payable periodically in advance, without reference to any specific loss; while the distinguishing feature of the other is an assessment of a sum, usually varying in amount according to the sum to be raised, to be ascertained and levied after the death of the insured. The reason, as we have seen, for this classification, and for granting a license to a member of the "assessment" class on more liberal terms than one belonging to the "premium" class, is that the former class does not necessarily pay its losses from a fund already in existence, but may raise it by a post mortem assessment, while the latter class must resort to a fund already accumulated, and which, for the security of policy holders, should be safely invested. The scheme upon which the state exacts taxes from foreign insurance companies rests, also, to some extent, on this distinction. Rev. St. § 2745.

We think, therefore, that, notwithstanding the fifth, sixth, and seventh requirements or conditions found in section 3630e, Rev. St., as amended in 1891 (88 Ohio Laws, p. 252), to bring a life insurance company into the class that transact business "on the assessment plan," within the purview of our statutes, its chief source of revenue should be post mortem assessments to pay specific losses. This view of the matter was, in substance, taken by this court in State v. Monitor Fire Ass'n, 42 Ohio St. 555. The court held that "an annual deposit, paid in advance, based on the hazards of the risk, and without reference to an amount necessary to pay losses that may occur during the year, is in fact a premium paid for carrying the risk, and not a specific assessment, authorized by the statute." The question there related to the transaction of fire insurance,

but the reasoning by which this court reached the conclusion announced in that case would seem to apply equally to the question of what constitutes insurance on the assessment plan in life insurance. State v. Western Union Mut. Life Ins. Co., 47 Ohio St. 167, 24 N. E. 392; State v. Moore, 38 Ohio St. 7. The policy of the relator, which has been recited, shows quite clearly that it exacts of its policy holders fixed sums, to be paid in advance at stated periods, and based on the hazard of the risk, and without reference to any specific loss.

An ingenious argument, based on the "privileges and agreements" set out on the back of the policy, has been presented by counsel for relator. In substance, however, these "privileges and agreements" do not differ from those provisions found in the policies of those companies, whether old line or mutual, which allow the holder to participate in the earnings of the company. Considerable stress was laid by counsel for relator on the proviso that appears on the back of the policy, in connection with the "privileges and agreements," to the effect "that, in all the preceding privileges, the amounts therein referred to shall not conflict with the statutory requirements of any state in which the association is at the time doing business." We know of no statute of this state with which those privileges and agreements conflict. These "privileges and agreements," however, assist in giving character to the plan on which the latter transacts its business. This plan falls within the reason of the statute that requires life insurance companies to deposit securities for the protection of policy holders as a condition to admission to transact business. The reason of that requirement, as we have shown, rests upon its necessity. It constitutes the chief reliance of policy holders who may reside within the state. Without such a deposit the guaranty of ultimate payment would be greatly weakened. The plan also conforms very closely to the letter of sections 3587-3609, inclusive, Rev. St. Its features bear a striking resemblance to life insurance contemplated by those sections, but disclose little if any similarity to that which section 3630e, even since the amendment of 1891 (88 Ohio Laws, p. 252), describes.

We think the relator is not entitled to a license, by virtue

of section 3630e, to transact business in this state, but, in order to obtain a license for that purpose, must comply with sections 3604, 3605, Rev. St.

2. The charter of the other relator, the Home Mutual Life Insurance Company of Detroit, omitting formal provisions immaterial to the questions before the court, is as follows:

"ARTICLE III.

"Section 1. The object of the incorporation of this company shall be to furnish life insurance to its members for the benefit of the widows, widowers, heirs and relatives of deceased members and other persons having an insurable interest in the life of such members.

"Sec. 2. There shall be one class or division of members in said company, to be known as the whole life class; the object or purpose of which shall be to furnish life insurance to each member therein by such members paying continuous premiums during life.

"ARTICLE IV.

"Section 1. Assessments, premiums and payments are to be paid by the members of this company periodically at such stated periods as shall be designated in the member's policy, according to the following table of rates for each one thousand dollars insurance, based upon the age of each member at last birthday.

Age.	Monthly.	Bi-monthly.	Quarterly.	Semi-annual.	Annual.
21	$0 90	$1 80	$2 70	$5 35	$10 58
22	91	1 82	2 73	5 41	10 70
23	92	1 84	2 76	5 46	10 82
24	94	1 88	2 82	5 58	11 05
25	95	1 90	2 85	5 65	11 17
26	97	1 94	2 91	5 76	11 41
27	98	1 96	2 94	5 82	11 52
28	99	1 98	2 97	5 88	11 64
29	1 00	2 00	3 00	5 94	11 76
30	1 01	2 02	3 03	6 00	11 88

Age.	Monthly.	Bi-monthly.	Quarterly.	Semi-annual.	Annual.
31	1 03	2 06	3 09	6 12	12 11
32	1 04	2 08	3 12	6 18	12 23
33	1 06	2 12	3 18	6 30	12 47
34	1 08	2 16	3 24	6 42	12 70
35	1 10	2 20	3 30	6 53	12 94
36	1 15	2 30	3 45	6 83	13 52
37	1 20	2 40	3 60	7 13	14 11
38	1 25	2 50	3 75	7 43	14 70
39	1 30	2 60	3 90	7 72	15 29
40	1 35	2 70	4 05	8 02	15 88
41	1 40	2 80	4 20	8 32	16 46
42	1 45	2 90	4 35	8 61	17 05
43	1 50	3 00	4 50	8 91	17 64
44	1 55	3 10	4 65	9 21	18 23
45	1 60	3 20	4 80	9 50	18 82
46	1 65	3 30	4 95	9 80	19 40
47	1 70	3 40	5 10	10 10	20 00
48	1 80	3 60	5 40	10 69	21 17
49	1 90	3 80	5 70	11 29	22 34
50	2 00	4 00	6 00	11 88	23 52
51	2 10	4 20	6 30	12 47	24 70
52	2 25	4 50	6 75	13 37	26 46
53	2 45	4 90	7 35	14 55	28 81
54	2 65	5 30	7 95	15 74	31 16
55	2 85	5 70	8 55	16 93	33 52
56	3 05	6 10	9 15	18 12	35 87
57	3 26	6 52	9 78	19 36	38 34
58	3 47	6 94	10 41	20 61	40 81
59	3 69	7 38	11 07	21 92	43 39
60	3 95	7 90	11 85	23 46	46 16
61	4 18	8 36	12 54	24 83	49 16
62	4 44	8 88	13 32	26 37	52 51
63	4 71	9 42	14 13	27 98	55 39
64	4 99	9 98	14 97	29 64	58 68
65	5 28	10 56	15 84	31 36	62 09

"Sec. 2. Special or extra assessments may be levied by the board of trustees, when it is necessary to meet mortuary losses. All special or extra assessments, or calls for additional premiums shall be apportioned among the members in such manner as to equitably distribute the mortality cost among such members in proportion each should have contributed, since becoming a member, on the basis of the American experi-

ence table of mortality, due allowance being given for all previous payments."

"Sec. 4. The moneys realized from assessments, premiums and payments shall be apportioned to the general fund, mortuary fund, and emergency fund. The object of the general fund shall be to provide for the payment of general or managing expenses of the company. The object of the mortuary fund shall be to provide for the payment of death losses. The object of the emergency fund shall be to provide a trust fund for the payment of death losses or other benefits provided for in the policy of the member, and to protect the company from extra assessments in case of an extraordinary death rate. The emergency fund shall not at any time be less than the maximum amount at risk on any one life, from and after the date of the incorporation of this company. The board of trustees shall apportion the money so realized from assessments, premiums and payments between the several funds named, as it may be deemed best for the interest of the company."

These provisions of its charter, together with that section of the statutes of Michigan (1 How. Ann. St. § 4217) which prescribes who shall be members of such corporations, and their rights as members, show that the relator the Home Mutual Life Insurance Company has neither capital stock nor stockholders for whose benefit it was created. Its policy holders are its members. They alone have a voice in the election of its officers, and it is for their benefit, at least in theory, that its business is conducted. Therefore the objection, founded on its internal structure, which was interposed to the claim of the other relator, the National Life Association of Hartford, to a license under section 3630e, Rev. St., does not apply to the claim of the present relator to a license under that section. The objection interposed to granting to the present relator a license rests upon its method of transacting business, which, the superintendent of insurance contends, is not conducted according to the assessment plan.

In order to obtain a correct notion of the scheme of insurance that it pursues, resort must be had to its form of policy, which is as follows:

"In consideration of the payment of the first —— premium hereon of —— dollars, and of the representations, agreements, and warrants made to it by insured, herein named, in his or her application for this policy of insurance, does hereby issue this policy of insurance to ——, of ——, state of ——, and in consideration of the payment in advance thereafter of —— premiums of —— dollars, this company does promise to pay the sum of —— dollars to ——, the beneficiary herein named, if living at the time of the death of the insured, and, if not living, then to the heirs at law of said insured, at the office of said company, in the city of Detroit, Michigan, within ninety days after the acceptance and approval of satisfactory proofs of the death of said insured, provided said death shall occur while this policy is in full force. This policy is issued, delivered, and accepted subject to the conditions and agreements, contained herein and on the back hereof, which are made a part of this contract as fully as if recited over the signature hereto affixed. In witness whereof," etc.

The conditions on the back of the policy are in the following terms:

"(1) It is expressly agreed that this policy shall not be in force until the same has been delivered to the insured and the first premium thereon shall have been paid in cash during the insured's lifetime and good health. (2) When this policy has been in continuous force for three years from its date, it shall be incontestable, except for the nonpayment of premiums when due, for understatement of age, or for fraud. (3) No personal liability is incurred by becoming a member of this company. Payments are optional with the insured, to continue as long as he may desire to keep the policy in force. Payments under this policy during its first two years, after providing for its pro rata of actual death claims occurring upon policies in the first and second policy years, and thereafter quarterly, an amount limited to one-eighth of one per cent. of the face value of this policy may be used for expense purposes; the remainder thereof to be apportioned by the trustees of said company among the mortuary, reserve, and emergency funds. * * * (6) The premiums herein required to be paid by the insured are to provide for the payment of

mortuary claims, and for the general fund and reserve or emergency funds of this company, and are based upon the adopted tables of rates, and graded according to the age of the insured and the amount of insurance named herein. Said tables of rates are based upon the American Mortality Tables, and the actual experience of American life insurance companies, and are deemed adequate to meet all present and future liabilities of the company, without necessitating an increase in the rate with advancing age; but, as an absolute protection against the possibility of the mortuary or reserve funds becoming depleted, it is agreed that, should any emergency arise, through epidemic or otherwise, whereby the premiums are insufficient to meet the mortuary requirements as determined by the board of trustees, additional premiums may be levied to meet such emergency, of which special notice shall be served. (7) It is expressly understood and agreed, by and between the insured, and this company, that if the insured shall not pay the sum or sums stipulated to be paid in the matter aforesaid, or if any misrepresentations shall have been made or any facts omitted which should have been stated in said app'ication, or if the insured shall violate any of the provisions of this agreement, then this contract shall cease to be binding upon said company, and all payments made shall be forfeited to said company. * * * (9) In case the insured shall fail to pay any premium at the office of the company, within the time specified for the payment thereof, a delinquent charge of twenty-five cents will be added. The membership of the insured in this company shall not lapse or determine until ten days after said company shall have mailed to said insured, as hereinabove provided, a notice that said premium has not been paid; and if said insured shall not pay said premium at the office of said company by twelve o'clock, noon, on the last day specified in said notice, then the insured's membership in this company shall lapse and determine, and this policy shall become null and void, and all payments made thereon shall be forfeited to the company, except when otherwise expressly provided herein. (10) The application of the insured for this policy of insurance, together with the articles of association and by-laws of this company now in force, or which may

hereafter be legally adopted, shall constitute a part of this policy. * * * (13) When the insured shall reach his life expectancy, computed on his age at the date of this policy, he may, by giving the company six months' notice in writing of his desire to do so, provided the policy is in full force and all payments have been made thereon, discontinue his payments upon the same, and apply his net contribution to the reserve or emergency fund, together with his equitable proportion of all accretions thereto, as determined by the actuary of the company, either to the maintaining of this policy in force until such credits are exhausted, when it shall cease and determine, or surrender this policy, and withdraw the same in cash, together with any unused dividend accumulations, in full settlement of all liability. (14) Dividends to be declared shall be limited to that part of the reserve fund in excess of $100,000 and in excess of the amount of one periodical payment from all policy holders. (15) When the policy has been kept in force continuously for a period of ten years from its date, the insured shall be entitled to participate in whatever dividends may be declared thereafter; the same to be determined and apportioned by the actuary of the company, and credited on premium accounts to reduce future payments on this policy. (16) In event the insured shall become totally and permanently physically disabled, said company will pay, upon proof satisfactory to the board of trustees, upon the receipt and surrender of this policy, in full discharge of all claims, the sum of one-half the face value hereof, provided the insured shall so request in writing, while this policy is in full force, subject to the agreements contained herein."

Does the scheme of insurance thus displayed coincide with that conducted on the "assessment plan," as that term is used in section 3630e? The obligation of the insured is to pay a fixed sum at stated periods in advance, without reference to any particular death claim. Section 6 of the conditions and agreements on the back of the policy shows that the premiums to be paid by the insured are to provide, indiscriminately, for the payment of death claims, to create a general fund, and a reserve or emergency fund, which latter fund may be increased to at least $100,000. The obligation of the policy

holder to pay a fixed sum periodically for three distinct purposes is subject to the right of the company to levy "additional premiums" to guard against "the possibility of the mortuary or reserve funds becoming depleted." Here there is no obligation or duty laid upon the company to await the exhaustion of these funds, or either of them, before calling upon the policy holder for additional premiums. These contributions, authorized by this emergency clause, though denominated "premiums," bear a close resemblance to assessments. The amount of the call is uncertain, and depends upon the will of the managing body of the concern,—its board of trustees. It is not, however, the chief or usual method of securing an income, and, if the affairs of the company are intelligently and honestly conducted, should never be resorted to, except in the event of some widely-spread and fatal epidemic. The ordinary, regular, and chief source of revenue open to the relator is the fixed periodical payments named in the policy, and, in our opinion, for the purpose of admission into the state, they characterize the method of insurance which the company pursues. The possibility that some grave and unforeseen calamity may call into operation an authority vested in the trustees to call for an additional and uncertain sum should not be regarded as sufficient to assign the company to that class which transacts the business of insurance on the assessment plan. The general assembly, in classifying life insurance companies into those that transact business on the assessment plan and those who do not, should be taken to have regarded their usual and regular mode of raising revenue, rather than the exceptional or occasional methods to which resort may be had upon the happening of some remote contingency.

We think neither of the relators transacts the business of insurance on the assessment plan, within the meaning of section 3630e, Rev. St. Writ refused, and petitions dismissed.

SEAMANS v. CHRISTIAN BROS. MILL CO.

Supreme Court of Minnesota 1896. 66 Minn. 205.

Premium. Non Compliance with Statute. Receiver.

Canty, J. The Wisconsin Mutual Life Insurance Company is, as its name indicates, a corporation organized under the laws of the state of Wisconsin to carry on a mutual life insurance business. It became insolvent, and plaintiff was appointed receiver for it by the courts of that state. Defendent, a corporation organized under the laws of this state and doing business therein, procured from said insurance company a policy of insurance on its property situated in Minneapolis, in this state. This suit is brought to recover a balance of unpaid premium claimed to be due on the policy. One of the defenses alleged by defendant, and sustained by the court below, is that said insurance company never complied in any respect with the statutes of this state. Judgment was ordered for defendant, and from the judgment entered accordingly, plaintiff appeals.

The contract of insurance was made by correspondence between the two corporations. The trial court found as a fact that this contract was made in this state. Appellant assails this finding as not supported by the evidence, but, from the view we take of it, the point is not material; and we are of the opinion that even if the contract was made in Wisconsin, as contended by appellant, we would still refuse to enforce it, as being contrary to the policy of our laws, and an attempt to evade those laws. Among the statutory provisions material here are the following sections of the General Statutes of 1894:

"Sec. 3157. It shall be unlawful for insurers or their agents to make, negotiate or solicit within this state any contract of insurance except as authorized by this act. * * *"

"Sec. 3161. The insurance commissioner, however, may issue to an agent who is regularly commissioned to represent one or more fire or fire and marine insurance companies, authorized to do business in this state, a certificate of authority

to place excess lines of insurance in companies not admitted to do business in the state; provided, however, that the party desiring such excess of insurance shall first file an affidavit with the insurance commissioner, stating that he has exhausted all the insurance obtainable from authorized companies."

Section 3167 provides that on complying with certain conditions the insurance commissioner may issue a license or certificate to foreign companies, authorizing them to transact business in this state; and section 3199 provides that no foreign mutual fire insurance company shall do business in this state unless it has an actual cash surplus of $200,000 over all liabilities, which the court found this insurance company did not have. Many other restrictions on such companies may be found in the sections immediately preceding and those following the ones above mentioned. These statutory provisions are police regulations intended to protect people and property in this state against spurious and irresponsible insurance companies. It is plainly the intent of these statutory provisions to compel all such insurers doing business in, or taking risks on property in, this state to comply with our local laws and submit to our local courts. Neither can there be any doubt about the authority of the legislature to pass such laws. Paul v. Virginia, 8 Wall. 168; Hooper v. California, 155 U. S. 648, 15 Sup. Ct. 207. It is a general rule that a contract made in one state will be enforced in another state, though contrary to the laws or public policy of the latter state. 3 Am. & Eng. Enc. Law, 543. This rule is more especially applicable when no particular place of performance is contemplated by the contract, but the place of performance may be anywhere. It is also a general rule that where a contract is entered into in one state, to be performed in a certain other state, the validity of the contract will be determined by the law of the latter state. Id. 542, 544; Whart. Confl. Laws. §§ 398, 486. We will not attempt to discuss the many and complex distinctions that have arisen where these two rules came in conflict. Usually, in such a case of conflict of laws, it is little more than a question of determining the intention of the parties to the contract,—whether they intended to be governed by

the one law or the other. But cases arise where the parties are not thus at liberty to select which law they choose. See Whart. Confl. Laws, §§ 490-494. The laws or public policy of a state may prohibit the making of a certain contract, but it does not follow that if the contract is made elsewhere such state may not, within its borders, enforce the same by extending to it the comity which exists between states. But, again, the laws and public policy of the state may be such as to completely stamp out this comity, and prohibit within the jurisdiction of the state the enforcement of the contract. Especially is this so if, though the contract was made elsewhere, it was to be performed within the state. There are many cases extending this doctrine of comity to contracts of insurance made elsewhere, and insuring property in the state in which the contract was enforced. See Whart. Confl. Laws, §§ 465-467. But, as before stated, it depends on the laws and public policy of such state whether or not it will thus enforce the contract. The laws and public policy may be such as to destroy this comity and prohibit such enforcement of the contract. We are of the opinion that the laws and public policy of this state in reference to the insuring of property are of this character. The restrictions in our statutes are so many, and the repressive character of the legislation such, that we must hold this to be the public policy of this state. This seems also to be the character of the insurance legislation in Iowa and Michigan, as appears by the cases of Seamans v. Zimmerman (Iowa) 59 N. W. 290, and Seamans v. Temple Co. (Mich.) 63 N. W. 408, where this same receiver was defeated in attempts to collect unpaid premiums from citizens of those states. Neither does it make any difference that the insurer is a mutual company or that it is, as appellant claims, unincorporated. Neither is this decision in conflict with Ganser v. Insurance Co., 34 Minn. 372, 25 N. W. 943, where it was held that the insured can recover the loss even though the insurer has not complied with the statutory requirements so as to be authorized to do business in this state. The very object of these statutory provisions is the protection of the insured, and the parties are not in pari delicto. This disposes

of the case, and renders it unnecessary to consider the other questions raised. Judgment affirmed.

Accord. Hoffman v. Banks 41 Ind. 1; Wiestling v. Warthin, 1 Ind. App. 217; Barker v. Lamb and Sons, 99 Iowa 686; Stevens v. Rasin Fertilizer Co. 116 Md. 679; Swing v. Cameron, 145 Mich. 175.

Note. Where the insurance company was not authorized to take risks except it be in a certain financial condition, and agents were prohibited from taking risks for a foreign company without first procuring a certificate from the state auditor that the company had complied with the statutory requirements. Held the agent who took risks for a company that had not complied with the statute and had not been given a right to do business, was liable to insured for the loss.

Hartman & Daniels v. Hollowell, 126 Iowa 643,—102 N. W. 524.

METCALF v. MILLER.

Circuit Court of Appeals. No. 614., 107 Fed. 223. Ninth Circuit. February 4, 1901.

Assessment on Stock of Insurance Company.

In Error to the Circuit Court of the United States for the District of Washington.

This is an action upon a promisory note given by the defendant in error to the plaintiff in error. The trial court directed a verdict for the defendant in error on the ground of want of consideration for the note. To reverse this ruling, the case has been brought to this court. The complainant states the diverse citizenship of the parties, and sets up the following note as having been given for a valuable consideration:

"2,500.00. Oakland, California, Dec. 12th, 1893.

"On or before one year from date, without grace, for value received, I promise to pay to the order of Victor H. Metcalf, at his office, No. 969 Broadway, Oakland, California, the sum of twenty-five hundred ($2,500) dollars, payable in gold coin,

and with interest thereon in like gold coin from date until paid at the rate of six per cent. per annum, payable semiannually.

"Mary M. Miller."

It is alleged that the plaintiff in error is still the holder and owner of said note, and that the defendant in error refuses to pay the same. The defendant in error, in her answer, denies that there was any consideration whatever for the said note, and as matter of affirmative defense alleges: That prior to the execution and delivery of said note she was the owner of 50 shares of the stock of the Oakland Home Insurance Company, a California corporation. That by misappropriation of funds for the payment of dividends the capital of said corporation was impaired, and on the 29th day of September, 1893, the insurance commissioner of California, under statutory authority, made a requisition on the company to make good within 60 days the impairment of the stock in the sum of $100,000 by assessment thereon. That on the same date the board of directors of said company, in pursuance of said requisition, passed the following resolution: "Resolved, that an assessment of $50 per share, amounting to $100,000, be, and is hereby, levied upon the capital stock of the Oakland Home Insurance Company, payable immediately, and stock upon which said assessment is not paid on November 15, 1893, shall be delinquent, and advertised for sale at public auction, and, unless payment is made before, will be sold on November 30, 1893, to pay delinquent assessment, together with costs of advertising and expenses of sale." That said resolution or order levying an assessment did not comply with the provisions and terms of section 334 of the Civil Code of California, in that it did not designate to whom and where said assessment was payable. The court below considered this a fatal defect, rendering the assessment illegal, and that there was, therefore, no consideration for the note. Plaintiff in error contends, however, that there was an inchoate liability imposed by the requisition of the insurance commissioner upon the stockholders, and the discharge of this liability would be a valid consideration for a note, without regard to the technical legality of the assessment levied by the board of directors. It

is also contended that the evidence tends to show that the note was given in consideration of the advance by various persons of the amount of the assessment upon the stock of the defendant in error, which advance had been made with her full knowledge, and that she chose to avoid litigation, and to discharge this liability impending over her stock, by a promise to pay the money which had been so advanced; that at the request of the lenders, and with the knowledge of the defendant in error, the note was made payable to the order of the plaintiff in error, with the understanding that he was to hold the note, and collect the same, and pay the proceeds thereof to said lenders; that, as a trustee of such express trust, he is beneficially interested in said note. The defendant in error denies the interest of the plaintiff in error in said note, and with regard to the circumstances surrounding the execution of the note alleges that she was a nonresident of California, and unacquainted with the laws thereof; that she was informed by the board of directors of said insurance company that her stock in said company would be sold unless she would give her note for the amount of said assessment, payable to the order of the plaintiff in error; that, relying upon such representations, she executed and delivered the note in controversy; that said statements and representations were false, and were known to be false by said directors at the time they were made, and that said note was, therefore, wholly without consideration.

Before Gilbert, Ross, and Morrow, Circuit Judges.

Morrow, Circuit Judge, after the foregoing statement of facts, delivered the opinion of the court.

The assignments of error comprise: (1) The admission of certain testimony of the defendant in error with regard to the reasons actuating the making of the note, and stating information received by her thereafter; and (2) the direction to the jury to return a verdict for the defendant in error.

As the principal inquiry is directed to the question of consideration for the note which is the basis of this action, and as the alleged want of consideration is based upon a charge of fraud, great latitude is to be allowed in the admission of evidence. The nature of fraud is such that it can seldom be es-

tablished by direct or positive evidence. Generally, it must be inferred from the facts and circumstances attending the particular transaction. It is the rule, therefore, that a person who seeks to prove fraud in a sale or other transaction may show every circumstance in the condition or relation of the parties, and every act or declaration of the party charged with the fraud, which, in the opinion of the judge, bears such a relation to the transaction under investigation as to be in its nature calculated to persuade the jury that the charge of fraud is or is not well founded; and this evidence may include dealings both before and after the time of the transaction under investigation, if tending to establish the fraud charged. 14 Am. & Eng. Enc. Law (2d Ed.) 195, 196, and cases there cited. Parties engaging in a fraudulent transaction frequently pursue such devious courses to conceal their designs, and resort to such subtle practices to mislead their victims, that their schemes cannot be detected unless the door is swung wide open for the admission of all testimony having any possible bearing upon the question. Sonnentheil v. Brewing Co., 172 U. S. 401, 410, 19 Sup. Ct. 233, 43 L. Ed. 492. The assignment of error with regard to the admission of testimony cannot, therefore, be sustained.

The main question for determination is, then, whether or not the trial court committed error in directing a verdict for the defendant in error upon the ground that the illegality of the assessment rendered the note void for want of consideration. Conceding that the resolution levying the assessment was imperfect in form, would such technical defect affect the validity of the note if the purpose of the assessment was a proper one, and the intention of the party executing the note was in accord with such purpose? In other words, was the consideration for the note dependent upon the form of the assessment? The state exercises a supervisory control over the business of insurance through the medium of an officer designated as "insurance commissioner," whose duty it is to issue to parties wishing to engage in the insurance business within this state, who may be found upon examination to be in the solvent condition provided by the insurance laws, certificates of authority to transact their business. Without such certificate, it is un-

lawful to transact such business. It is the further duty of the insurance commissioner to thoroughly inspect and examine the affairs of persons or companies engaged in such business, and, if found to be insolvent, to revoke the certificate granted, and require the capital of such person or corporation to be repaired by assessments upon the stockholders within such period as he may designate. If, upon such requisition, the deficiency of capital is not made up, the commissioner must communicate the fact to the attorney general of the state, whose duty it is to commence an action against such person or corporation for a decree of dissolution. Pol. Code Cal. §§ 600, 601. The law creates the liability of the stockholders in an insurance company for any deficiency in the capital stock of the corporation, and the requisition of the insurance commissioner fixes that liability, and sets in motion the proceedings necessary to make up the deficiency and restore the corporation to a solvent condition. When the insurance commissioner has made his requisition, the authority of the insurance company to incur further insurance liability is suspended, and the stock of the corporation is immediately charged with the burden of making the capital stock good. The levy of an assessment upon the stockholders is a part of the procedure for accomplishing that purpose, but, whether the assessment is formal or informal, regular or irregular, it neither creates nor discharges the liability of the stockholder for the deficiency. This legal responsibility has been determined by law prior to the assessment, and it only remains for the corporation, by means of an assessment, to levy and collect from each stockholder his pro rata share of the amount necessary to repair the capital of the corporation. It follows that, when the insurance commissioner has made his requisition upon an insurance company to make good its impaired capital, the liability of the stockholder for the deficiency has been determined and fixed, and the stock is thereafter subject to the incumbrance of the requisition. It would follow it in the case of a transfer, and affect its value as security. From the moment of the making of the requisition by the commissioner, there is imposed upon the stockholders the liability to pay their proportionate amounts of the deficit, or to suffer a total loss by the forfeiture of the charter and

consequent dissolution of the corporation. This being true, the liability of the stockholder is not entirely dependent upon the form of the resolution levying the assessment, and, if the defendant in error gave the note in controversy for the purpose of discharging her liability under the requisition of the commissioner, there was undoubtedly a consideration for the note, which could not be defeated by a technical defect in the formal levy of assessment. But the defendant in error, in her affirmative defense, charges that the note was obtained by fraud, through false statements and representations. It is the general rule that whether or not there has been fraud in any given case, and whether there have been false representations by the party charged with the fraud, is a question for the jury to determine in actions of law. Stewart v. Cattle Ranche Co., 128 U. S. 383, 9 Sup. Ct. 101, 32 L. Ed. 439; Bartlett v. Smith (C. C.) 17 Fed. 668. The question of the sufficiency of the consideration for the note not being dependent upon the legality of the assessment, but upon the circumstances and conditions under which the note was executed, the question is one of fact to be determined by the jury from the evidence. Judgment reversed, and the cause remanded for a new trial.

CHAPTER III.

MUTUAL COMPANIES.

STEVENS v. REEVES, STATE TREASURER, et al.

Supreme Court of California, 138. Cal. 678. March 23, 1903.

Mutual Co. Organization. Statute. Securities.

Action by Lydia M. Stevens against Truman Reeves, State Treasurer of California, and others. Judgment for defendants. Plaintiff appeals. Reversed.

McFarland, J. A demurrer was sustained to the complaint, and judgment rendered for defendants. Plaintiff appeals from the judgment. The question involved is whether or not the complaint states a cause of action.

The purpose of the action is to have canceled and removed, as a cloud upon plaintiff's title, a certain note and mortgage now held by the defendant Reeves, as Treasurer of the state of California. It is averred that the defendant the International Indemnity Company is, and ever since April 23, 1895, has been, a corporation formed under the general laws of California for the purpose of carrying on the business of mutual insurance on the assessment plan, under the provisions of an act of the Legislature entitled "An act relating to life, health, accident and annuity or endowment insurance on the assessment plan, and the conduct of the business of such insurance," approved March 19, 1891. See St. 1891, p. 126, c. 116. It was averred that the defendant Dusenbury, who is a brother of the plaintiff, was one of the principal incorporators and promoters of said corporation, and represented to plaintiff that, in order to organize and carry on the proposed business of said corporation, it was necessary to deposit security in the sum of $5,000 with the State Treasurer, and for that purpose he re-

quested her to make and execute the note and mortgage here involved. Thereupon, and without any consideration whatever accruing to plaintiff, but merely on this statement of her brother, and solely for his accommodation as aforesaid, she, on April 23d, gave Dusenbury her promissory note for $5,000, and as security for the same executed to him a mortgage on certain described real property belonging to her, and situated in the city of Oakland. This note and mortgage—the note and mortgage here in question—were assigned by Dusenbury to the said corporation, and the latter assigned the same to the State Treasurer, who now holds the same as assignee. The corporation took the note and mortgage with full knowledge of all the facts and circumstances under which they were executed. It is averred that "the International Indemnity Company has never at any time conducted or transacted any business whatever under or in accordance with the laws of this state, or with the said act of March 19, 1891, hereinbefore referred to, and has never complied with the requirements of said act necessary to authorize it to transact its said business, and that the Insurance Commissioner of said state has refused to license or permit the said corporation to conduct or continue to conduct or carry on its said business, or any business whatever"; and also that an action by the people, upon the relation of said Insurance Commissioner, is now pending to enjoin said corporation from doing any business, for its failure to comply with the provisions of said act, and to dissolve the corporation, and that in said action there is an order so enjoining it pending the action. And it is averred in the complaint "that said International Indemnity Company has never complied with the provisions of the said act of March 19, 1891, nor any other law of the state of California authorizing it to transact business. That the treasurer of said corporation has never received the sum of $5,000 from two hundred or more persons who have applied in writing for membership or insurance therein. That no sum of money has ever been invested by or on behalf of said corporation in bonds or securities approved by the Insurance Commissioner of this state, or at all, nor deposited in any bank in this state, or elsewhere, where it would or will earn interest. That no bonds or securi-

ties, nor evidence of any deposit with any bank at any place, have ever been placed or deposited by or on behalf of said corporation, through the Insurance Commissioner of this state or otherwise, with the State Treasurer," other than the mortgage in question. It is further averred that for these failures to comply with the act "the said International Indemnity Company never did acquire the right, and never did have power or authority, to issue any policy or contract of insurance or indemnity whatever." It is further averred "that there are no contracts whatever of said defendant corporation outstanding with any person or persons."

We think that the complaint states a cause of action, and that the demurrer should have been overruled. There was, of course, no consideration for the mortgage accruing personally to plaintiff. If we endeavor to look at it as a statutory obligation—like an undertaking on attachment or appeal—provided by law to be given to enable another person to enjoy a statutory privilege, it was also without consideration; the act of 1891 makes no provision for such a note and mortgage, given as these were given. Of course, if the mortgage had gone into the hands of the State Treasurer regularly, and pursuant to the provisions of the act, the defense here made of want of consideration would not have been available. The only supposable purpose was to substitute the note and mortgage for the $5,000 which must be paid by at least 200 persons "who have applied in writing for membership or insurance therein"; and it is clear that the act does not allow such substitution. It evidently contemplates that there must be such confidence in the proposed scheme that at least 200 persons can be found who will apply for membership or insurance, and pay in the prescribed amount of money; not that one or two of the promoters can evade that provision by themselves putting up some sort of security. Moreover, if we could imagine that the mortgage ever had any legal value, it has, if the averments of the complaint are true, long since become utterly worthless. The corporation never acquired authority to do any of its proposed business, and it has no outstanding contracts, even if it had attempted to make them. The mortgage, therefore, has no significance whatever, except as an

incubus upon the property described in it; and we see no reason why plaintiff should suffer from that incubus indefinitely. She is not compelled to wait until the state, through its agent, shall see fit to dissolve the corporation. The question of the existence of the International Indemnity Company as a corporation, either de jure or de facto, under the general laws of this state, is not here involved.

The judgment is reversed, with directions to the court below to overrule the demurrer to the complaint.

Note. A mutual insurance corporation is not a partnership to be dissolved when its policy holders reside in different states and become involved in war. Cohen v. Insurance Co. 50 N. Y. 6103; 10 Am. Rep. 522; Mutual Benefit Life Ins. Co. v. Hillyard, 37 N. J. Law, 444, 18 Am. Rep. 741. But see Kruth v. Insurance Co., 77 Pa. 15.

PEARSON v. MUTUAL INS. CO. OF GREENVILLE et al.

Supreme Court of South Carolina. 61 South Carolina 321. 1901.

Mutual Insurance—Persons Not Members.

Action by James H. Pearson against the Mutual Insurance Company of Greenville, S. C., and Mary A. Pearson. Motion to dismiss complaint refused, and defendant company appeals. Reversed.

The order of the circuit court in passing on defendant's demurrer is as fo'lows: "This action comes before this court upon a motion to dismiss the complaint herein upon the ground that said complaint 'fails to allege facts sufficient to constitute a cause of action, in that (1) it appears from the face of the complaint that the defendant the Mutual Insurance Company of Greenville, S. C., made its contract, not with the plaintiff, but with its co-defendant, Mary A. Pearson; (2) it appears upon the face of the complaint that the plaintiff was not a member of the defendant corporation, and under its

charter the said corporation has power to insure only the property of its members.' The complaint alleges that the defendant the Mutual Insurance Company of Greenville, S. C., is a corporation existing under the laws of this state. See 21 St. at Large, p. 1120. Under its charter the corporation 'did not have the power to insure the property of any but members of the association.' Jacobs v. Insurance Co., 52 S. C. 112, 29 S. E. 533. What a stranger to the insurance company must do to become a member of the corporation is not clearly stated in the act. It is possible that a person may be a member but not a policy holder in the company. A policy holder, under the act, must be a member of the company. From the allegations of the complaint, and the wording of the motion to dismiss the complaint, it would seem that one must make an application for insurance, and that the company, if it wishes to do so, may issue its policy of insurance to such applicant. According to the allegations of the complaint, which, for the purpose of this motion, must be regarded as true, the defendant the insurance company did not wait for the plaintiff to apply for insurance, but approached plaintiff and solicited plaintiff to insure in the defendant company. The complaint, after alleging that the plaintiff was the owner of the property insured, alleged that W. P. Pickens, 'as supervisor or agent of the defendant company,' came to plaintiff 'while absent from his house, and solicited the plaintiff to insure his property in the company of the defendant'; that plaintiff consented, stating that the property belonged to him, but that he was then too busy to go to the house to attend the same, whereupon the said W. P. Pickens stated that 'the wife of plaintiff could attend to the matter as well as if p'aintiff were there in person, and plaintiff assented thereto.' These allegations clearly state that the action of the plaintiff was predicated upon the representations of the agent of the defendant company. It is distinctly alleged that the agreement to insure was made by the said agent with the plaintiff, and that said agent 'stated that the wife of plaintiff could attend to the matter as well as if the p'aintiff was there in person.' Accordingly it is alleged in the complaint that said agent went to the house, and then 'wrote out an application for the pro-

posed insurance, and had Mary A. Pearson, the wife of plaintiff, to sign the name.' If the agreement was not carried out, it was the fault of the agent of the defendant company, and the failure of said agent to carry out said agreement was after he had notice a second time that plaintiff was the owner of the property. Even after the second notice said agent 'had Mary A. Pearson' to sign the application. The complaint alleged that 'the policy was issued by the defendant company in the name of Mary A. Pearson, instead of the name of the plaintiff.' The next allegation in the complaint was 'that the plaintiff paid all of the advance fees, premiums, and assessments, and all of the same thereafter accruing, and performed all of the conditions precedent required to be by him performed, as the insured, by the said written policy of insurance.' It is therefore alleged that plaintiff contracted with the defendant company for insurance, and paid said company for such insurance. Defendant company should not be permitted to take advantage of its own wrong. It should not be allowed to solicit business, sell insurance, accept pay therefor, and then refuse to comply with its agreement. I think that the views herein expressed are in accord with the law as stated in Sparkman v. Supreme Council, 57 S. C. 16, 35 S. E. 391, and that the case of Jacobs v. Insurance Co., 52 S. C. 112, 29 S. E. 533, is not hostile thereto. Wherefore it is ordered, adjudged, and decreed that the motion to dismiss the complaint herein be, and hereby is, refused and dismissed."

The defendant insurance company appeals on following exceptions: "First. His honor erred in not sustaining appellant's motion to dismiss the complaint upon the ground that it failed to allege facts sufficient to constitute a cause of action in that (1) it appears from the face of the complaint that the defendant the Mutual Insurance Company of Greenville, S. C., made its contract, not with the plaintiff, but with its co-defendant, Mary A. Pearson; (2) it appears upon the face of the complaint that the plaintiff was not a member of the defendant corporation, and under its charter the said corporation has power to insure the property of only its members; (3) the complaint fails to allege that the plaintiff was a member of the defendant corporation, and under its charter

appellant has no power to insure other than its members. Second. Error in holding: 'It is therefore alleged that plaintiff contracted with the defendant company for insurance, and paid said company for such insurance. Defendant company should not be permitted to take advantage of its own wrong. It should not be allowed to solicit business, sell insurance, accept pay therefor, and then refuse to comply with its agreement.' It being respectfully submitted that, if the company has no power to insure property of other than members, any alleged contract with any other person or persons would be ultra vires, and beyond the reach of estoppel. Third. Error in holding that the case of Jacobs v. Insurance Co., 52 S. C. 112, 29 S. E. 533, is not hostile to the view expressed in the said decree. It being respectfully submitted that the said decree is directly repugnant to the doctrine of the said case, and under the authority of said case appellant's motion should have been sustained. Fourth. Error in holding: 'It is possible that a person may be a member but not a policy holder in the company.'"

Pope, J. (after stating the facts). The plaintiff brought his action against the defendant the Mutual Insurance Company of Greenville, S. C., to recover the sum of $275 because of the loss by fire of a small dwelling house and some personal property alleged to be protected from loss by fire by the policy of insurance issued by the defendant the Mutual Insurance Company of Greenville. At the trial before his honor Judge James Aldrich and a jury, when the complaint was read the defendant (appellant) made its demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, in this: "(1) That it appeared from the face of the complaint that the defendant insurance company made its contract, not with the plaintiff, but with its co-defendant, Mary A. Pearson: (2) the complaint failed to allege that the plaintiff was a member of defendant corporation, and under its charter the said corporation had power to insure the property of only its members." The circuit judge overruled the demurrer in an order, which the reporter will include in his report of this cause. From this order the defendant in-

surance company appealed, and these grounds of appeal may be set out by the reporter.

We will reproduce the complaint, omitting the first article, which merely alleges the corporate character of the defendant insurance company, as follows: "(2) That the plaintiff during the times hereinafter mentioned was the owner in fee of the following described real estate, to wit: One certain one-story frame dwelling and one two-story frame barn, with the sheds attached, all of which was appurtenant to a certain tract of land situate in said state and county. (3) That the plaintiff was likewise the owner of certain household goods, furniture, wearing apparel, etc., at the time hereinafter mentioned. (4) That about the 1st of February, 1898, one W. P. Pickens, as supervisor or agent of the defendant the Mutual Insurance Company of Greenville, S. C., came to plaintiff, where he was working in his field, some distance from his said house, and solicited the plaintiff to insure his property in the company of the defendant Mutual Insurance Company of Greenville, S. C.; that plaintiff finally consented, stating to the said W. P. Pickens that the property belonged to him, but that he was then too busy to go to the house to attend to the same, whereupon the said W. P. Pickens stated that the wife of plaintiff could attend to the matter as well as if plaintiff was there in person, and plaintiff assented thereto. (5) That the said W. P. Pickens thereupon left plaintiff and repaired to his house, where the said W. P. Pickens wrote out an application for the proposed insurance, and had Mary A. Pearson, the wife of plaintiff, to sign the same. (6) That the defendant Mary A. Pearson distinctly informed the said W. P. Pickens that the property proposed to be insured belonged to her husband, the plaintiff herein. (7) That on the 14th of February, 1898, the defendant the Mutual Insurance Company of Greenville, S. C., issued its policy, No. 3,252, by which it insured the said real property belonging to plaintiff to the amount of $225, and the said personal property of plaintiff to the amount of $50, against loss or damage from or by fire from noon on February 14, 1898, until expiration of the company's charter, provided the policy was kept in force by the performance on the part of the insured of the conditions pro-

vided in the said written policy of insurance; but the policy was issued in the name of the defendant Mary A. Pearson, the wife of the plaintiff, instead of to the plaintiff in his own name. (8) That the plaintiff paid all of the advance fees, premiums, and assessments, and all of the same thereafter accruing, and performed all of the conditions precedent required to be by him performed, as the insured, by the said written policy of insurance. (9) That the defendant Mary A. Pearson in the making of the said application acted as the agent of the plaintiff; that she likewise received and held the said policy of insurance in her name as the agent of the plaintiff, for his benefit; and also that a trust thereby arose and resulted in favor of plaintiff. (10) That about February 1, 1899, the said buildings and said personal property were totally destroyed by fire, to the damage of plaintiff $800. (11) That, although duly notified, the defendant the Mutual Insurance Company of Greenville, S. C., refuse to pay any part of the said insurance, and that the said defendant company is now liable for and owes the plaintiff the sum of $275, with interest thereon. (12) That, although duly offered, the defendant the Mutual Insurance Company of Greenville, S. C., refuses to arbitrate the questions at issue between them and the plaintiff. (13) That the defendant Mary A. Pearson has or claims to have some interest in the said policy of insurance. Wherefore the plaintiff demands judgment: First, that the interest, if any, of the defendant Mary A. Pearson be determined by a judgment of this court; second, that the plaintiff recover against the defendant the Mutual Insurance Company of Greenville, S. C., the sum of $275, with interest thereon from the date of said loss until paid; third, for his reasonable costs and disbursements."

There is no doubt that the conclusion of the circuit judge would have been correct, in holding that the defendant insurance company would have been estopped both in denying the contract with the plaintiff whereby the house and lot were insured in the wife's name instead of his own, because they received his money, and because, also, its agent, W. P. Pickens, took part in procuring this insurance, if the charter had not restricted its power to insure property to persons who were

members of the insurance company. Section 2 of its charter, under the act of 1897 (22 St. at Large, pp. 640, 641), reads as follows: "Sec. 2. That the corporation [the Mutual Insurance Company of Greenville, S. C.] shall have the right to mutually insure the places of business, dwelling houses, barns and other buildings and property *of its members in Greenville county or elsewhere in the state*—such insurance to be against loss by fire, wind or lightning—upon such terms and under such conditions as may be fixed by the by-laws of said corporation, and all policies heretofore issued by said corporation upon all kinds of property of its *members* are hereby validated,"—approved the 2d day of March, A. D. 1897. (Italics ours.) The charter is a limitation upon the corporation itself and all of its agents. The public is bound to deal with such corporation within its chartered powers, where such chartered powers emanate from the state and are contained in the published laws of this state. When, therefore, a chartered corporation and citizens deal with each other with respect to a subject-matter covered by the charter, but at direct variance with the powers conferred by the state's charter, they do so at their peril. Such acts of the chartered corporation are ultra vires. This court, in the case of Jacobs v. Insurance Co., 52 S. C., at page 119, 29 S. E. 537, has declared that: "Under the charter of the corporation, it did not have the power to insure the property of any but members of the association. She [Mrs. Jacobs] was not a member, and therefore her property could not be insured." There is no doubt but that the agent, W. P. Pickens, as the agent of the defendant insurance company, could bind his principal, both by his knowledge and his acts, within the scope of his agency, but also within the powers conferred by the charter of the insurance company, even if this is a mutual benefit insurance company. McBryde v. Insurance Co., 55 S. C. 589, 33 S. E. 729, and Sparkman v. Supreme Council, 57 S. C. 16, 35 S. E. 391. All the conversation had by W. P. Pickens, as agent, and Mr. and Mrs. Pearson, before the application in writing was signed by Mrs. Pearson, and the policy thereon was issued to Mr. Pearson, was absorbed by and merged in the written instruments. It thus appeared that Mrs. Pearson became a member, but she did not own the house and personal property, for both of these were the prop-

erty of Mr. Pearson, the plaintiff, respondent. The result is quite a hardship to this poor, deserving plaintiff, yet we are unable to wrest the law from its declared purpose. The circuit judge was in error, and his order must be reversed. It is the judgment of this court that the judgment of the circuit court be reversed, and the action be remanded to that court to sustain the demurrer to the complaint.

Accord. In re Mutual Guarantee Fire Ins. Co. 107 Ia. 143, 77 N. W. 868. Osius v. O'Dwyer 127 Mich. 244.

UNION FRATERNAL LEAGUE v. WALTON.

Supreme Court of Georgia. 109 Ga. 1. Oct. 25, 1899.

Insurable Interest. Mutual Benefit Certificate. Beneficiary Named by Insured. Law of State. Law of Society.

Little, J. R. Annie Walton instituted an action against the Union Fraternal League, an insurance corporation of the state of Massachusetts, doing business in Georgia, to recover the sum of $2,000, besides interest, being the amount of a certain certificate of membership insurance issued by the defendant company on the life of Sid A. Pughsly, Jr., in which the plaintiff was named as the beneficiary. The certificate was taken out by Sid A. Pughsly, Jr., on his own life, and upon his own application, and kept in force at his own application, and kept in force at his own expense, as a member of the local lodge of the defendant company, doing business in Laurens county, Ga. To the petition was annexed a copy of the certificate of membership and insurance, by which it appears that the defendant company undertook to pay out of its beneficiary fund of the class in which the certificate was issued a sum of money, not exceeding $2,000, to Mrs. R. Annie Walton on the death of Pughsly. In the certificate the beneficiary, Mrs. Walton, is named as "cousin." Attached to the certificate are a number of conditions, to which no particular reference need be made. Certain tables of designations and figures are also printed on the back of the certificate, and in

reference to them is a collection of rules designated as "Laws on the Foregoing Table," which seem to be more in the nature of explanation than of arbitrary rule. Among these we find the following: "Speculative risks will not be tolerated, nor will any benefits be paid to other than blood relatives, or dependents on the member." "The foregoing plan of family protection is devised to insure permanent success, and to restrict the admission of undesirable people." It appears from the certificate that the defendant is a Massachusetts corporation, and the signatory clause recites that it was executed in Boston, Mass. It does not, however, otherwise appear whether the contract was executed in Georgia or Massachusetts, nor does the record contain the charter of the defendant company, nor any part of its constitution or by-laws. The defendant filed a demurrer to the petition on the sole ground that it set forth no cause of action, because it did not appear that the said Mrs. R. Annie Walton, the beneficiary named in the certificate of insurance, had any insurable interest in the life of the insured, Pughsly, it being admitted as a fact on the hearing that the beneficiary was not related to the assured on whose life the insurance was taken out by himself for her benefit. The demurrer was overruled, and error assigned to that judgment.

One question only arises for determination under the record in this case; that is, whether a beneficiary named by a member of a fraternal or benevolent association which provides for life insurance is entitled, after the death of such member, to recover the amount of the benefit, without showing any insurable interest in the life of the deceased. The contention of the plaintiff in error is that the contract under consideration must be governed by the principles of law applicable to ordinary contracts of life insurance, and the legal proposition is submitted that a policy in favor of one who has no insurable interest is void, as it is a wager contract, and against public policy. We cannot assent to the correctness of this proposition. A contract of life insurance is defined by our Civil Code (section 2114) as one by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The last paragraph of this section is in the following words: "The life may be that of the

assured, or of another in whose continuance the assured has an interest." Taken together, the meaning of the section is that one may insure his own life without qualification; that he may not insure the life of another, unless he has an interest in the continuance of the life of that other. Necessarily, in the first instance, the amount of the policy is to be paid to some one other than the insured, because, ordinarily, under the contract, the amount is not payable until his death. By section 2116 of the same Code it is provided that the assured may direct the money to be paid to his personal representative, or to his widow, or to his children, or to his assignee; and it is further provided that, when the insurer gives such directions, no other person can defeat the same, and that the assignment is good without such assent. We are aware that there is a seemingly irreconcilable conflict between the adjudicated cases as to whether the assignee of a life policy takes anything under the assignment unless he has an insurable interest in the life insured. But it will be noted that under the provisions of our Code no such qualifications are made, essential to the validity of the assignment, nor do we think under sound reasoning any can exist. The rule which restricts the execution of a valid contract of insurance on the life of another to one who has an insurable interest in that life is founded alone on public policy, and it may be stated in general terms that, where one has an interest in a life that interest is insurable. Beyond all controversy, a man has an insurable interest in his own life, and we fail to see, when, having that interest, he enters into a contract with an insurer, by which, for a stipulated sum, which he periodically pays, the insurer becomes liable to pay a given sum of money at the death of the insured, why he who is most interested, whether actuated by the ties of relationship, motives of friendship, gratitude, sympathy, or love may not make the object of his consideration the recipient of his own bounty. It is to be replied that a temptation is extended to the beneficiary by improper means to hasten the time when he shou'd receive the amount of the policy,—and it is for this reason that such contracts will only be upheld when the idea of temptation is rebutted by the natural ties of blood or affinity,—we might well ask ourselves why executory devises, bequests, pro-

visions for support and maintenance provided for friends, and even strangers, are not subject to the same inhibition, as being against public policy. But while, as we have before said, many adjudicated cases, frequently contrary to natural justice, clearly ho'd that, unless the beneficiary or assignee has an insurable interest in the life of the insured, the policy or assignment is void, we shall undertake to show by authority that such is not the rule of the law. Mr. Greenhood, in his treatise on the Doctrine of Public Policy in the Law of Contracts (pages 279, 280), lays down two rules so abundantly supported by adjudicated cases as to make their citation impractical here. The first is: "A policy of insurance issued on the life of one in whose life he to whom the policy is issued has no insurable interest, unless he is a mere trustee for the life assured, or a policy issued to one upon his own life, if he be merely the agent of another, who is without interest, for whose benefit the insurance is thus taken, although upon the face of it it is payable to such person, is void." The second is: "But one may insure his own life for the benefit of any person, although the latter may have no insurable interest in the life of the former." In support of the rule last laid down the author quotes from a leading case (Investment Co. v. Baum, 29 Ind. 240) the following strong and expressive language: "It cannot be questioned * * * that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased of the sum so contracted to be paid, it does not concern the insurers. The appel'ant's contract with the insured is to pay the money to the appellee, and, upon such payment being made, it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured." Mr. Joyce, in his treatise on Insurance (volume 2, § 918), declares that "the weight of authority seems also to favor the proposi-

tion that, if a person effects a valid insurance upon his own life, and the transaction is bona fide, and not intended to circumvent the law, the assignment to another will be upheld, even though the assignee has no insurable interest in the life insured." In the case of Amick v. Butler, 111 Ind. 578, 12 N. E. 518, Mitchell, J., delivering the opinion, refers to this question in the following language: "It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money upon the event of the death of the person whose life is insured; or, having taken a policy, valid in its inception, that he may in good faith assign his interest in such policy, as in any other chose in action,"—for which he cites Hutson v. Merrifield, 51 Ind. 24; Insurance Co. v. Sefton, 53 Ind. 380; Ashley v. Ashley, 3 Sim. 149; Insurance Co. v. Allen, 138 Mass. 24; Clark v. Allen, 11 R. I. 439. He further says: "In either case the essential point is that the transaction be bona fide, and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law;" citing Investment Co. v. Baum, 29 Ind. 236; Olmstead v. Keyes, 85 N. Y. 593; Campbell v. Insurance Co., 98 Mass. 381; Insurance Co. v. Schaefer, 94 U. S. 457; Insurance Co. v. Hogan, 80 Ill. 35; Cunningham v. Smith, 70 Pa. St. 450. And in relation to the conflict between such rulings and the adjudicated cases which seem to hold otherwise he says: "The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance;" citing Insurance Co. v. Hazzard, 41 Ind. 116; Cammack v. Lewis, 15 Wall. 643; Warnock v. Davis, 104 U. S. 775. Mr. Justice Bradley, in the case of Insurance Co. v. Schaefer, 94 U. S. 460, in discussing what is an insurable interest, says: "But precisely what interest is necessary in order to take a policy out of the category of mere wager has been the subject of much discussion. In marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still an interest of some sort in the insured life must exist. A man cannot take out insurance

on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is well settled that a man has an insurable interest in his own life and in that of his wife and children, a woman in the life of her husband, and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or suvivors. The old tontines were based substantially on this principle, and their validity has never been called in question." In the case of Loomis v. Insurance Co., 6 Gray, 399, Chief Justice Shaw, delivering an opinion which involved the question of insurable interest, used this language: "All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the life of the cestui que vie; that his temporal affairs, his just hopes, and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of another. Such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and, whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have. One thing may be taken as settled,—that every man has an interest in his own life to any amount in which he chooses to value it, and may insure it accordingly." In the case of Sabin v. Phinney, 134 N. Y. 423, 31 N. E. 1087, it was held that a member of the Ancient Order of United Workmen of New York can legally direct the sum due at his

death to be paid to a stranger who has no insurable interest in his life.

The true rule, as we take it on the authority of a very large number of cases collected in a note to the case of Morrell v. Insurance Co., a Massachusetts case, reported in 57 Am. Dec. 102, is that one may insure his life, and make the amount of the policy payable to whom he pleases, provided the contract is not made at the expense and for the benefit of the person designated as the beneficiary, as a cover for a mere wagering contract. In a note to the same case authorities are cited for the proposition "that the insurable interest which one has in his own life is what supports the policy in such a case." As laid down in 4 Field, Briefs, § 417, the rule is that: "Any person may insure his own life for the benefit of his creditors, relatives, friends, or even strangers. But if the insurance is effected by some other person it is essential that he have a pecuniary interest in the life of the assured." To the same effect, see Robinson v. Association (C. C.) 68 Fed. 825; Olmstead v. Keyes, 85 N. Y. 593; Lemon v. Insurance Co., 38 Conn. 294; Fairchi'd v. Association, 51 Vt. 625. We think, also, that this court has recognized the doctrine for which we are contending in the case of Society v. Paterson, 41 Ga. 338. where McCay, J., declared that the law which prohibits the insurance of a life by another who has no interest in the continuance of that life is founded on a sound public policy, and that it was intended to prevent gaming policies, and to avoid that inducement to crime which would exist if it were permitted. In the case then under consideration it appeared that a woman who contracted marriage had at the time a living husband, making, of course, the last contract of marriage void. While living together under such void marriage, the supposed husband procured a policy of insurance on his life in favor of the woman with whom he was then living. Payment of the policy was resisted on the ground that she had no insurable interest in the life of the person insured. This court he'd that such a contract of insurance did not come within the reason of the law which prohibited gaming policies, nor was it open to the objection that it offered an inducement to crime. Judge McCay, in his opinion on this subject, said: "Though the

marriage was illegal, yet in fact the woman had an interest, and a deep interest, in the life of the husband. He treated her as his wife. He supported her as such. She passed in society as such, and she was dependent upon him for support as such. It was the husband who in fact effected this policy. It was his own method of extending to this woman his assistance and protection after he should himself be dead. Here is no gaming, since the very person whose life is insured is himself the actor in the transaction. So, too, as to the temptation to crime offered to the beneficiary of the policy. It would seem, when the person whose life is insured is himself the actor in the matter, the amount of temptation held out to others to take his life may, as a general rule, at least, be left to his discretion." Further on in the same opinion, referring to the provision now found in our Code, which expressly permits the insured to direct the money to be paid to his assignee, he says: "And if he may do this, we do not see that an insurance effected by him, as the assured of another, for that other's benefit, is not equally good." We have entered into the discussion of this case at length because of the fact, as stated in the outset, that the adjudicated cases are in conflict. But we feel assured, both by reason and the long line of adjudicated cases to which only partial reference has been made, that the true rule which should obtain in such cases is that, where one obtains a contract of insurance on his own life, and keeps up the same out of his own means, and directs the amount of the policy to be paid at his death to another whom from love, friendship, or any other reason he desires to benefit, the named beneficiary is entitled to recover on such contract, notwithstanding it may not be shown that he or she has any other insurable interest in the life of the deceased than exists in his good will, and emanates from his expressed wish to benefit. It is, after all, but a gift from him to one whose interests he desired to promote, and whose welfare he wished to protect when he was dead. Such a contract is in no sense a mere hazard, and is composed of none of the elements which make up a wagering policy; and it is only these that the law, mindful of the best interests of the citizen, prohibits.

There is, however, another view to be taken of the ques-

tion which arises in this case. Differences exist between contracts entered into under the plan of ordinary life insurance and those made by benefit societies. We only call attention, however, to those differences which exist in the selection of the beneficiary. A contract entered into by a benefit society with a member is, of course, executory, and its terms and conditions are ordinarily manifested by the certificate of membership. In addition to such, the charter of the society, its constitution and by-laws, necessarily form a part of such contract. Arthur v. Association, 29 Ohio St. 557; Hellenberg v. District No. 1, 94 N. Y. 580; Society v. Clendinen, 44 Md. 429. The law which provides for the organization of a benefit society usually specifies the classes of persons who may be made beneficiaries of the insurance; and where the organic law of the society, or the charter procured from the state under that law, prescribes what classes of persons may become beneficiaries of its insurance, it is not in the power of the society, or one of its members, or both, to enlarge or restrict these classes, for the society has no authority to create a fund for a person who does not belong to one of such classes, and the member has no right or power to designate such person as his beneficiary. Nibl. Ben. Soc. Acc. Ins. § 158, citing Association v. Rolfe, 76 Mich. 146, 42 N. W. 1094; Insurance Co. v. Miller, 13 Bush, 489; Ridge v. Society, 146 Mass. 286, 15 N. E. 628. Under an act of the state of Michigan which authorized the organization of societies to secure to the family or heirs of any member upon his death a certain sum of money it was held that no other person than a member of the family or an heir of the person insured could be made a beneficiary, and an old army comrade and intimate friend, who had been designated by the member as the beneficiary, could not take. Society v. Hoyt, 46 Mich. 473, 9 N. W. 497. A large number of adjudicated cases supporting this principle may be found in Bacon's treatise on the Law of Benefit Societies and Life Insurance (section 237), and the reason which underlies the rule is that the member of the society has, under his contract, no interest nor property in the benefit, but has simply the power to appoint some one to receive it. If, however, there is nothing in the charter or by-laws of the organization, nor in the

statutes of the state, restricting the appointment, the member may designate whomsoever he pleases, and no one can question the right. 1 Bac. Ben. Soc. § 246; Massey v. Society, 102 N. Y. 523, 7 N. E. 619; Knights of Honor v. Watson (N. H.) 15 Atl. 125; Walter v. Hensel, 42 Minn. 204, 44 N. W. 57. In the present case, while it appears on the face of the certificate that the plaintiff in error is a Massachusetts corporation, none of the provisions of the charter appear in the record, nor any portion of its constitution or by-laws is set out, nor can it be now determined whether the contract of insurance is to be governed by the laws of the state of Massachusetts or by those of Georgia. Hence no restriction of the power of the member to name the beneficiary is made to appear, and, the certificate evidencing a contract of life insurance similar to those entered into by mutual companies, the case will be determined under the general law applicable to insurance contracts. It is true that on the back of the certificate appears a condensation of certain explanations, in which it is asserted that speculative risks will not be tolerated, nor benefits paid to other than b'ood relatives or dependents. It does not appear, however, unqualifiedly, as it is arranged, that it is one of the conditions referred to in the certificate, and without further explanation we are not able to say that it is. Therefore, so far as the record appears, there was nothing to restrict the designation of the beneficiary by Pughs'y at the time he entered into the contract, and by the terms of the contract the benefit fund is made expressly payable to the defendant in error. Being so, and treating this contract as subject to the law which fixes the insurable interest of a beneficiary where the policy is taken out and maintained by the insured, no reason appears why the defendant in error was not entitled to maintain her action, and the judgment of the court below in overruling the demurrer is affirmed. All the justices concurring, except Lumpkin, P. J., dissenting.

Lumpkins, P. J. (dissenting). A policy of life insurance naming as the beneficiary thereof one who has no insurable interest in the life of the insured is a wagering po'icy, and therefore void, although taken out by the insured at his own expense. Independently of adjudications rendered outside of

this state, I am of the opinion that the question raised in this case is settled by section 2114 of the Civil Code, which reads as follows: "An insurance upon life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy. The life may be that of the assured, or of another in whose continuance the assured has an interest." That is to say, the life insured may be that of the beneficiary named in the policy, or the life of another person in the continuance of which life the beneficiary has an insurable interest. "The beneficiary of an insurance policy may be defined as the party to whom the proceeds are made payable by the terms of the contract;" and "beneficiary" and "assured" are synonymous terms, though the former is the more commonly used. 3 Am. & Eng. Enc. Law (2d Ed.) 926. The question at issue was neither made in, nor passed upon by, this court in the case of Society v. Paterson, 41 Ga. 338. It is true the report of that case discloses that in the requests to charge made by counsel for the defendant this question was presented to the trial judge for his determination; but the motion for a new trial, the denial of which was the only ruling excepted to, did not in the remotest manner invoke a decision of the question whether one can take out a valid policy of insurance on his own life for the benefit of a stranger; nor is any such question dealt with in the synopsis of the points decided, which, under our statute, is the official announcement of the decision rendered. Accordingly, the remarks of Judge McCay upon the subject of insurable interest should be treated as merely obiter, and in no sense binding as authority.

Accord. Nelson v. Gilson 97 Ill. App. 595; Nye v. Grand Lodge A. O. U. W. 9 Ind. App. 131, 36 N. E. 429; Masonic Benevolent Association v. Bunch 109 Mo. 560; Independent Order of Sons and Daughters of Jacob of America v. Henderson 76 Miss. 326, 24 So. 702.

Note. It is now generally provided by statute that beneficiaries named in the certificate of a Mutual Benefit Society must be certain designated persons related to, or dependent upon, the insured. Gillon v. Dale 96 Kans. 362, 76 Pa. 861; Wolf v. District Grand Lodge 102 Mich. 26, 60 N. W. 445.

PARKER v. LAMB & SONS

Supreme Court of Iowa. 99 Iowa 265 October 16, 1896.

Comity Between States.

ROTHROCK, C. J. It appears from the averments of the petition that the Mutual Fire Insurance Company of Chicago, was organized under the laws of the state of Illinois, and that the defendant is a corporation organized and doing business under the laws of this state. Applications were made by the defendant for insurance in said company, which applications were accepted, and in part consideration for said insurance the defendant executed and delivered to the said insurance company two premium notes, one for the sum of seven hundred and fifty dollars, and the other for five hundred and twenty-five dollars. These notes were promises to pay the said insurance company, such sums thereon, as the directors might from time to time order and assess to pay losses and the expenses of said company. The contracts of insurance were made, and the premium notes executed and delivered, on the eleventh day of April, 1889, and the insurance was for five years. The policies of insurance remained in force until the eleventh day of April, 1890, when they were surrendered to the insurance company, and canceled, and the premium notes were returned to the defendant. On the twelfth day of November, 1890, a suit in chancery was instituted in the circuit court of Cook county, Ill., against the said fire insurance company, and on the twenty-first day of February, 1891, the plaintiff herein was appointed receiver of said company, and of its property and assets. Afterwards, and in July, 1891, an order was made by said circuit court, by which the receiver was directed to assess upon each of the members of said insurance company sixty-five per cent of the premium notes, and make demand therefor of the persons liable on said notes, and proceed to collect the same. Said order or decree further provided that, if any member or members of said company, failed or refused to pay the amount of the assessment for thirty days after notice and demand, the said receiver should

then proceed to collect from such member, or members, the whole of their premium note, or notes. The defendant was notified of the assessment, and of the amount that it was required to pay under said decree on each of its premium notes. Payment was refused, and this action was commenced to recover the whole amount of the premium notes, and judgment was demanded therefor.

We have set out the substance of the claim made in the petition, (1) so far as it pertains to what we think are the material facts in the case. One ground of the demurrer was in these words: "Said petition shows upon its face that the defendant is a corporation, organized and doing business under and by virtue of the laws of the state of Iowa; that the Mutual Fire Insurance Company of Chicago, as receiver of which plaintiff brings this action, was a corporation, organized and doing business under the laws of the state of Illinois; and it is not further shown therein that said company was possessed of the requisite capital to authorize it to transact business in the state of Iowa, or that said Mutual Fire Insurance Company had in any manner complied with the laws of the state of Iowa, or was entitled to write insurance or transact business in said state." We wi l not set out other grounds of demurrer, for the reason that we think a proper determination of that part of it above quoted is conclusive of the rights of the parties. It presents the single question whether the plaintiff can maintain the action, or, as stated by appellee's counsel in argument: "Will a foreign receiver of an insurance company, which had never complied with the laws of this state so as to be entitled to transact business herein, be permitted to maintain an action in the courts of this state upon the premium notes executed to such foreign insurance company by a citizen of Iowa for a policy written by it upon property in this state?" It is to be observed that, both in the statement of facts and in the demand for judgment this action is founded upon the premium notes. Copies of the notes are not set out in the petition nor exhibited therewith for the alleged reason that the notes are not in the possession of the plaintiff. It appears to us that this court has, in effect, determined the question here presented. In Ayres v. Siebel, 82 Iowa, 347, 47 N. W. 989, it was held that a trustee of a for-

eign corporation will not be permitted to maintain an action in the courts of this state upon a contract between such corporation and a citizen of this state. It was conceded in that case that the same rule applied to a receiver, except that in such case the right to maintain an action has sometimes been recognized as a matter of state comity. And the claim is made that such a rule is applicable to the facts here presented. It is to be conceded that there is not entire harmony in the decisions of courts upon this question. We do not think that under the facts in this case there is any comity which can properly be invoked to sustain the action. In High on Receivers (section 239), the following is stated to be the true rule: "Upon the question of the territorial extent of a receiver's jurisdiction and power for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the supreme court of the United States, and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction or power of official action, and cannot go into a foreign state or jurisdiction, and there institute a suit for the recovery of demands due the person or estate subject to his receivership. His functions and powers, for the purpose of litigation, are held to be limited to the courts of the state in which he was appointed; and the principles of comity between states and nations which recognize the judicial decisions of one tribunal as conclusive on another do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." Elaborate arguments are presented by the respective counsel in this case, and numerous authorities are cited, which we have examined, and, without citing them or reviewing them, we believe that the rule as above stated is correct in principle, and well sustained by the weight of authority.

2. It is contended by counsel for appellant that the doctrine of comity and respect for the judicial orders and decrees of another state should be applied in the case at bar. It is possible that, if this contract of insurance was one which under the laws of this state might lawfully be made, it would be a proper case in which the courts of this state would entertain and determine such an action. But that question we do not

determine. The contract of insurance, so far as the right of the company to insure property in this state is involved, was void. By section 1707 of McClain's Code it was absolutely prohibited from directly or indirectly taking any risks or transacting any business of insurance in this state unless possessed of two hundred thousand dollars of actual paid-up capital, and complying with other conditions named in said section. It being admitted that there was not even an attempt to comply with the law, the plaintiff is in no position to demand that under any policy of comity he is entitled to maintain the action. In Hurd v. City of Elizabeth, 41 N. J. Law, 1, it is said that "the more correct definition of the legal rule would be that a receiver cannot sue or otherwise exercise his functions in a foreign jurisdiction, whenever such acts, if sanctioned, would interfere with the policy established by law in such foreign jurisdiction." If the rule contended for by counsel for appellant in this case were to be adopted by this court, it would be in direct conflict with the legislative policy of this state. We have already determined this question in Seamans v. Zimmerman, 91 Iowa 363, 59 N. W. 290, where we held that a foreign insurance company, not having complied with the statute above cited, cannot recover assessments under the policy of insurance issued on property in this state.

3. It is urged in behalf of appellant that the statute above cited is unconstitutional. We have given that question proper examination and attention, and we discover no ground, either upon principle or authority, for sustaining this contention. We do not believe it to be necessary to give further consideration to this point in the case.

4. But it is said, that the assessments made by the plaintiff under the decree of the circuit court of Cook county are an adjudication or judgment of that court as against the defendant, and that said adjudication is binding on the courts of this state. We think this contention is not sustained by the facts stated in the petition nor by the decree. The petition, as we have said, is not founded on the decree. The cause of action is plainly stated to be upon the premium notes. It ought to be understood, also, that the amount is not for a fixed and unalterable sum. It is true, it is named as sixty-five per

cent of the premium notes, and for failure to pay for thirty days the receiver was required to collect the whole amount of the notes. That this decree was no adjudication is also plainly shown by the record. Before the insurance company became bankrupt, the notes were delivered up to the defendant, and the policy was surrendered. There is no presumption that there was any fraud in this transaction, and when the contract was thus cancelled the defendant was no longer a policy holder in the company, and was not a party to the proceeding in the Illinois court. The case requires no further consideration, and the judgment of the district court is affirmed.

Accord. State v. Phipps 50 Kans. 609, 18 L. R. A. 657; State v. Stone 118 Mo. 388, 25 L. R. A. 243; Commonwealth v. Reinoehl 163 Pa. St. 287.

BURMOOD v. FARMERS' UNION INS. CO.

Supreme Court of Nebraska. 42 Neb. 598. 60 N. W. 905, 1894.

Defenses to Assessment.

Error to district court, Hall county; Thompson, Judge.

Action by the Farmers' Union Insurance Company against Peter Burmood to collect assessments made against him as a member of such company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Ragan, C. The Farmers' Union Insurance Company, hereinafter called the "Insurance Company," was a mutual insurance company organized under chapter 43, Comp. St. 1893. Peter Burmood became a member of said insurance company, and on his application therefor the insurance company issued to him a contract of insurance in and by which it agreed to insure his property in the sum of $2,250 against loss or damage by fire, lightning, etc., for a term of five years from the 3rd day of January, 1889. In consideration of this contract of insurance, Burmood agreed to pay to the insurance company the sum of $67.60, in 20 assessments, not more than 4 of such

assessments to be payable in any one year, nor a greater amount than 25 per cent of the above named premium to be assessed in any one year. The contract of insurance also provided that it might be canceled at the request of Burmood by his paying all assessments up to the date of such request, together with $2 as a cancellation fee, and surrendering the insurance policy or certificate of membership. The insurance company brought this suit to the district court of Hall county against Burmood to recover the balance of the premium promised by him to be paid in consideration of his membership in the company and of the contract of insurance issued by the insurance company indemnifying him against loss or damage to his property. The insurance company had a verdict and judgment, and Burmood brings the case here on error. All the errors assigned and relied upon here for a reversal of the judgment may be considered under three heads.

1. It appears that in February, 1892, the auditor of state refused the insurance company a certificate of authority for continuing the business of insurance in the state of Nebraska. The refusal of the auditor to permit the insurance company to do business in the state of Nebraska subsequent to the 1st of January, 1892, while it prohibited the insurance company from taking new risks, was not a prohibition on the insurance company's collecting assessments and premiums from its members for the purpose of paying losses that had or might thereafter occur on business already done, and consequently the action of the auditor of state is not a defense to Burmood in this action.

2. About the time that the auditor of the state refused the insurance company a certificate for taking risks and doing business in the state of Nebraska, the directors of the insurance company entered into an agreement with the Continental Insurance Company. By the terms of this agreement it is agreed to give the Continental Insurance Company a list of the agents in the employ of the mutual company in Nebraska, with their post-office addresses, and it agreed to use its influence in order to have its members insure their property in the Continental Insurance Company, that company agreeing to carry the insurance at 3 per cent., and, in case any mem-

ber of the insurance company should avail himself of the privilege of insuring his property with the Continental Insurance Company, then such member's premium and his contracts held by the insurance company were to be surrendered to him. We are not called upon in this case to decide whether the insurance company or its board of directors had any authority to enter into this contract with the Continental Insurance Company. Burmood did not avail himself of the opportunity of insuring his property in the Continental Insurance Company and then taking up his contract with the insurance company of which he was a member. Notwithstanding the contract made with the Continental Insurance Company, the Farmers' Union Insurance Company continued to exist. Its contracts with its members and the agreements of the members with the company and with each other remained wholly unaffected by this agreement; and the making or the existence of the contract between the insurance company and the Continental Company cannot be pleaded by Burmood as a defense to this action.

3. On the 9th day of July, 1892, Burmood surrendered his policy to the insurance company, and paid to it a cancellation fee of $2, and he now insists that on that date he ceased to be a member of the company; that the contract between him and the company was then and there rescinded, and that therefore he is not liable in this action. But this defense must also fall. Under the contract between the insurance company and Burmood, if Burmood wished to cancel such contract, and be relieved from any liability thereon, it was not only necessary for him to surrender the policy to the company and pay the insurance company a cancellation fee of $2, but he was also required by the policy to pay all assessments made against him up to date. At the time Burmood surrendered his policy to the insurance company there were assessments due against him and unpaid for $6.60, which assessments he has never paid. The contract of insurance, then, has never been canceled; and if a loss had occurred to the property of Burmood at any time prior to the date of the rendition of the judgment herein—January 5, 1894—the company would, so far as the existence or nonexistence of the contract is concerned, have

been liable for such loss. This contract is a mutual one; not one that can be rescinded at the whim of either party thereto, but can only be rescinded or canceled in the manner provided by its terms. Mr. Burmood having failed to pay the assessments due against him at the time he surrendered his policy and paid the cancellation fee, the policy was not canceled. There is no error in the record, and the judgment of the district court is affirmed.

Accord. Nichol v. Murphy 108 N. W. 704.

Note. 1. After cancellation of his certificate the member is still liable on assessments necessary to meet losses accrued prior to the cancellation.

Malan v. Longworthy 70 Ill. App. 376; Peak v. Yule 123 Mich. 675, 82 N. W. 514; Commonwealth v. Mechanics' Mutual Fire Insurance Co. 112 Mass. 192.

Note 2. The member, however, is not liable for losses accruing prior to his membership. Mutual Fire Ins. Co. v. Jean 96 Md. 252; 53 Atl. 950.

PRADER v. NATIONAL MASONIC ACCIDENT ASS'N.

Supreme Court of Iowa. 1895. 95 Ia. 149.

Injuries Received While Intoxicated.

Action in equity to recover on a certificate of membership, and to compel the levying and collection of an assessment for the payment of the amount claimed to be due. There was a hearing on the merits, and a decree for the plaintiff. The defendant appeals. Modified.

Robinson, J. The defendant is a corporation duly organized under the laws of this state. In December, 1889, it issued to Christian M. Prader a certificate of membership, by which the defendant agreed to pay twenty-five dollars each week, for a period not exceeding fifty-two consecutive weeks, as indemnity for loss of time resulting from bodily injury inflicted during the life of the certificate, through external, violent, and accidental means, which should, independently of all other causes,

immediately, wholly, and continually disable him from transacting his business. The certificate further required the defendant to pay to the wife and child of Christian M. Prader, in case he should die from the effects of the injuries against which the certificate provided, within ninety days of the time of receiving them, the sum of five thousand dollars. But the agreements stated were on the conditions that the defendant should not be liable for a greater sum than should be realized from one assessment of two dollars made upon and collected from all its members assessable on the date on which the injury should be received. On the thirtieth day of October, 1892, Prader met with an accident by which one of his legs was broken, and which, it is claimed, caused his death on the eighth day of the next month. This action is brought by his widow, in her own right and as guardian of her minor child, Rudolph Prader, to recover indemnity for the loss of time of the decedent, and five thousand dollars for his death, and to compel the defendant to levy and collect an assessment to pay the amount claimed to be due. The district court adjudged that the plaintiff was entitled to recover, fixed the amount at five thousand and twenty-five dollars, and ordered that the defendant and its officers make and collect an assessment of two dollars on each of its members, and that the proceeds of the assessment, not exceeding the amount stated, be paid to the plaintiff.

1. Before filing its answer, the defendant appeared and filed an application for a change of the place of trial to Polk county, on the ground that it was a mutual benefit association organized upon the mutual assessment or co-operative plan, for the purpose of paying benefits to its members for accidents occurring to such members, and to no other persons, by means of assessments levied on its members; that it is not an insurance company, and does not do an insurance business; that it was incorporated, and its principal place of business is in Polk county; that it has not and never has had an office or agency in Jones county, and that the original notice was served on it in Polk county. Resistance to the motion was filed, which claimed that the defendant was an insurance company, and which showed that it had an agent in Jones county, who was

authorized to transact business for it. The motion was overruled, and of that ruling the defendant complains. Section 2584 of the Code is as follows: "Insurance companies may be sued in any county in which is kept their principal place of business, in which was made the contract of insurance, or in which the loss insured against occurred." This clearly authorizes an action against an insurance company to be brought in the county in which the loss occurred, even though the principal place of business of the company is in another county of the state. Hunt v. Insurance Co., 67 Iowa, 742, 24 N. W. 745; Insurance Co. v. Granger, 62 Iowa, 272, 10 N. W. 504. But it is said that the defendant is not an insurance company, within the meaning of the section quoted, and that as its principal place of business was in Des Moines, it was entitled to have the case tried in Polk county. "Insurance" is defined to be "a contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a special peril." See 11 Am. & Eng. Enc. Law, 280, note. The fact that the contract may be subject to a condition will not affect its character. Most contracts of insurance are founded upon conditions. It is said that the case of State v. Iowa Mut. Aid Ass'n, 59 Iowa, 125, 12 N. W. 782, and chapter 65 of the acts of the Twenty-First General Assembly, authorized the conclusion that mutual benefit associations are something other than and different from insurance companies. The case and statute referred to show that such associations are governed by laws made especially applicable to them, and not to the general insurance laws of the state regulating life insurance. But they do not show that the associations are not insurance companies. The object of the defendant, as stated in its articles of incorporation, is "to furnish its members the advantages of accident insurance." Its by-laws require that "each and every member shall pay for his insurance in equal amounts." The application for membership, signed by Prader, stated the "insurance, in case of accidental death, to be $5,000." The certificate on which this action is founded refers to Prader as "the assured," and "the insured," and provides that the "insurance does not cover" certain specified cases. It is quite clear that the theory that the defendant is not engaged in doing

an insurance business was not entertained when the contract in question was made, and it has no support in the statutes of this state. We conclude that the defendant is an insurance company, within the meaning of section 2584 of the Code, and that the motion for the removal of the cause to Polk county was properly overruled. See Matt v. Association, 81 Iowa, 135, 46 N. W. 857.

2. The application of Prader for membership in the defendant contains the following: "I agree that this certificate shall not cover any injury happening through or while under the influence of intoxicating drinks or narcotics." A provision of the certificate issued is as follows: "This insurance does not cover * * * accident, nor death or disability, resulting wholly or in part, directly or indirectly, from any of the following causes, or while so engaged or affected: * * * Intoxication or narcotics." The appellant contends that Prader was under the influence of intoxicating liquor when the accident in question happened; that his death was due to the excessive use of such liquor; and that, therefore, it is not liable on account of his death. The evidence discloses the following facts: The deceased was a hardware merchant engaged in business in Monticello. In the morning of October 30, 1892, he left the town with his son Rudolph, then about 18 years of age, and a companion named Smith. The party were in a one-horse delivery wagon, and had with them three guns, ammunition, a quart bottle of whisky, and food for a luncheon. The reason given by Prader for making the trip was that he wished to purchase some wood. After driving a few miles, he spoke to a man about wood. After that the party drove about two miles further, and stopped in the woods, seven or eight miles northeast of Monticello, for the purpose of hunting. The testimony of Rudolph and Smith with respect to what occurred in the woods is not in all respects the same, but it appears from what they state that between 11 and 12 o'clock in the forenoon they returned to the wagon, and found Prader lying in it. Rudolph states that his father said he had slipped into a hole, and hurt one of his legs, but Smith says nothing in regard to such a statement. Luncheon was eaten, and Rudolph and Smith left the wagon, and continued to hunt till about 4

o'clock in the afternoon, when they again returned to the wagon, and again found Prader in it. They harnessed the horse, and drove about two and one-half miles towards Monticello, stopping at the house of a man named Brenneman. They remained there for some time, and, as they were leaving, in walking from the house to the wagon, Prader stepped into a hole, and fell to the ground, dislocating his right ankle, and fracturing the right tibia. He was assisted into the wagon, and driven home. The next day a physician was called, who set the broken bone, replaced the dislocated one, and continued to treat Prader, until the 8th day of November, when he died. The evidence in regard to the use of intoxicating liquors by the deceased on the day of the injury is substantially as follows: The plaintiff states that he "appeared to be all right when he left the house" in the morning. Rudolph states that the whisky they had was taken by himself and Smith; that his father did not drink any of it, and that some of it remained when they reached home. He also states that his father drank at least one glass of wine at Brenneman's. Smith testified that all three drank of the whisky, Prader drinking only a small quantity; that about one-third of it was gone when they started for home; that Prader drank wine at Brenneman's, but that it was his opinion that Prader was sober when the accident occurred at Brenneman's. Brenneman testified that, in the afternoon of the day of the accident, Prader, his son, and Smith, came to his house, and Prader asked him for something to drink; that he treated them to new wine made from alder berries and grapes, and weakened with water; that Prader drank of it twice, each time the contents of a small wine glass, and that he did not seem to be intoxicated. Brenneman also testifies that he drank "a good many glasses" before Prader came that day, but that it did not affect him. Mrs. Brenneman states that the wine had just been made from grapes and alder berries; that Prader did not show that it affected him, and that it did not make him drunk. This evidence does not show that the accident in question resulted from intoxication, nor that Prader was under the influence of intoxicating drinks when it happened, and there is no other evidence in regard

to his use of intoxicating liquor or its effect upon him at that time.

3. The appellant claims that the death of Prader was due to heart failure, which was the result of chronic alcoholism, and not to the accident in question. To sustain that claim, it offers the testimony of Dr. Mirick and Dr. Hunter. The knowledge of both in regard to the condition and cause of the death of Prader was acquired chiefly, if not wholly, while they were acting as his physicians. Dr. Mirick had been Prader's family physician for several years. Dr. Hunter was called to consult with Dr. Mirick a few hours before Prader's death, and his knowledge of the conditions and cause of death of Prader was derived from the history of the case as given him by Dr. Mirick and from a personal examination. The plaintiff objects to the testimony of these physicians, on the ground that their knowledge was obtained professionally, for the purpose of properly discharging their duties in the treatment of Prader, and that it is therefore privileged and incompetent. Section 3643 of the Code is as follows: "No practicing * * * physician * * * shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice. * * * Such prohibition shall not apply to cases where the party in whose favor the same are made shall waive the right conferred." This statute, in its application to verbal communications made by patients to their physicians, has been considered in the following cases: Guptill v. Verback, 58 Iowa, 99, 12 N. W. 125; Raymond v. Railway Co., 65 Iowa, 152, 21 N. W. 495; McConnell v. City of Osage, 80 Iowa, 298, 45 N. W. 550. As applied to such communications, its meaning is clear and settled.

But it is contended by the appellant that it has no application to knowledge acquired by physicians by a personal examination of their patients, or from any source other than statements made by them. The privilege did not exist at common law, but is created by statute, and varies in different states. The general rule is said to be that "the privilege extends to facts necessary to enable the physician to prescribe,

and which are communicated to him for the purpose of enabling him to perform his professional duties. Such facts are privileged, whether learned directly from the patient himself, or acquired by the physician through his own observation or examination." 19 Am. & Eng. Enc. Law, 147. By a statute of New York, "any information" which the physician may have acquired in attending his patient in a professional character, and which was necessary to enable him to prescribe as a physician, is privileged. Under that statute, information may be privileged which is derived from the statements of the patient, from the statements of others about him, or from the observation of his appearance and symptoms. Edington v. Insurance Co., 67 N. Y. 194, 77 N. Y. 568. The same rule is followed under a similar statute in Missouri. Gartside v. Insurance Co., 76 Mo. 446.

Under a statute of Indiana, physicians are not competent witnesses "as to matters confided to them in the course of their profession, * * * unless with the consent of party making confidential communication." This has been held to apply to matters learned by observation and by examination of patients. Association v. Beck, 77 Ind. 203. Although the statute of this state uses the word "communication," it means much the same as the word "information" in the statutes of other states to which we have referred. The prohibition of our statute refers, not merely to verbal communications, but to those of any kind by which information of the character of that specified in the statute is imparted. Information of the actual condition of a patient may be much more readily communicated to or acquired by a physician through a personal examination than by statements of the patient. In many cases exact knowledge can only be obtained by means of such examination, and it is clear that it as much to the interest of the patient to have the information so obtained treated as confidential as it would be had he known and communicated it verbally. We conclude that the prohibition of section 3643 is not confined to verbal communications, but that it extends to facts which are learned by a physician in the discharge of his duties, from his own observation and examination of the patient. If the facts thus learned are of a confidential character, and are necessary and

proper to enable the physician to discharge his professional duty to his client, they are protected. So far as the testimony given by Dr. Mirick is of that character, it cannot be considered by us, and the same is true of the testimony of Dr. Hunter. The information he received from his associate was necessary to enable him to discharge his duty properly, and cannot be used for any other purpose. It is protected by the statute. When the incompetent testimony is rejected, no evidence remains to sustain the claim that the death of Prader was caused by chronic alcoholism. Several witnesses who saw him during his last sickness testified, in substance, that he was not suffering from any disease or trouble excepting the injuries caused by the accident and their effects. He was in great pain, and the injured limb turned black, the discoloration finally extending to his body. It is true, death rarely results from no other cause than a broken limb, and it is quite possible that Prader was in a diseased condition at the time of the accident, and that his death was due in part to that condition. One witness (Dr. Mirick) testifies that there were times during the last year and a half preceding his death when Prader was intemperate, but that was not sufficient to show that his death was caused by intemperance. The evidence justifies the conclusion that the proximate cause of death was the accident and the resulting injury to his limb, and, in the absence of proof to the contrary, is sufficient to show a right of recovery. Sutherland v Insurance Co., 87 Iowa, 506, 54 N. W. 453.

4. The certificate in suit provides that it shall not cover "accident nor death or disability resulting wholly or in part, directly or indirectly, from any of the following causes, or while so engaged or affected: * * * Violating law." The accident in question happened on Sunday, and the appellant contends that it is not liable by reason of the provision quoted. Section 4072 of the Code provides that "if any person be found on the first day of the week, commonly called Sabbath, engaged in * * * hunting, shooting, carrying firearms, * * * every person so offending shall, on conviction be fined in a sum not more than five dollars nor less than one dollar." A sufficient answer to the claim of the appellant made under this statute is that Prader is not shown to have been engaged in

doing any of the prohibited acts at the time of the accident. There is some testimony in regard to a mishap in the woods, but, if any injury was sustained then, it was not serious. The accident which caused the death of Prader happened at Brenneman's some hours after he stopped hunting, and several miles from the place where he had been engaged in that occupation. The case of Duran v. Insurance Co., 63 Vt. 437, 22 Atl. Rep. 530, relied upon by the appellant, is not in point. The statute of the state of Vermont, which was construed in that case, prohibited traveling as well as hunting on Sunday. The accident there in question happened while the assured was engaged in hunting or in traveling, and, as both were prohibited, the accident appears to have resulted from an illegal act. It may be that if Prader had not gone to the woods to hunt he would not have been at Brenneman's, and therefore would not have stepped into the hole; consequently would not have injured his leg on the day in question; but that does not show that the injury was caused by his violation of the law. That was too remote to be regarded as a cause of the accident.

5. The articles of incorporation of the defendant contain the following:

"Art. 11. Disputed claims shall be adjusted as follows: Should such a claim arise, it shall be referred to a committee of three, all of whom shall be master masons,—one to be chosen by the assured or his representative, one by the association, and the two so chosen shall select the third,—none of whom shall be relatives of the assured, or have any pecuniary interest in the claim. No suit shall be brought upon any disputed claim before the same shall have been arbitrated by such committee, and the award of said committee shall be final and conclusive upon the claimant and the association."

These provisions are also contained in the certificates. None of the matters in controversy have been submitted to arbitration, and the defendant pleads the provisions we have quoted, and the fact that no arbitration has been had as a defense. The appellee contends that the provision to arbitrate is not a bar to this action. As a general rule, the parties to an agreement may stipulate for the determination of specified questions which may arise between them by a third person or by arbi-

trators. Thus, a provision that the amount of money which shall be paid for materials to be furnished or services to be performed, or the time of payment, shall be determined in a specified manner, or by a person or body named, is valid, and will be enforced. Ross v. McArthur, 85 Iowa, 204, 52 N. W. 125; Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945; U. S. v. Robeson, 9 Pet. 319; Haley v. Bellamy, 137 Mass. 357; Hudson v. McCartney, 33 Wis. 332; Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Old Saucelito Land, etc., Co. v. Commercial Union Assur. Co. (Cal.) 5 Pac. 232; Insurance Co. v. Lewis (Fla.) 10 South. 297; Gasser v. Fire Office, 42 Minn. 315, 44 N. W. 252. Many other authorities might be cited to the same effect. It is equally well settled that a general provision by which the parties to an agreement in terms bind themselves to submit to arbitration all matters of dispute which may thereafter arise, and making the arbitration final, will not deprive the courts of their appropriate jurisdiction, nor be enforced by them. Delaware & H. Canal Co. v. Pennsylvania Coal Co., supra; Seward v. City of Rochester, 109 N. Y. 165, 16 N. E. 348; Insurance Co. v. Lewis, supra; Reed v. Insurance Co., 138 Mass. 572; Holmes v. Richet, 56 Cal. 307; Old Saucelito Land, etc., Co. v. Commercial Union Assur. Co., supra; Stephenson v. Insurance Co., 54 Me. 55; Mentz v. Insurance Co., 79 Pa. St. 478; Trott v. Insurance Co., 1 Cliff. 439, Fed. Cas. No. 14,189; Kinney v. Association (W. Va.) 14 S. E. 297; 2 May, Ins. § 492; 2 Chit. Cont. 1183; 2 Pars. Cont. 707; Morse, Arb. 91; 2 Story, Eq. Jur. § 1457; 11 Am. & Eng. Enc. Law. 353. The provisions under consideration are general in their terms, and apply to "all disputed claims," whatever their character may be. They contemplate awards which shall be final and conclusive, and the questions involved in them may be of law as well as of fact. They provide for the settlement of all disputed claims by the arbitrators to the exclusion of the courts, and are to that extent contrary to the rule of law we have stated, and will not be enforced. These provisions were considered in Whitney v. Association (Minn.) 54 N. W. 184, and held not to bar an action where an arbitration had not been made. The case involves precisely the question here

decided, and fully supports our conclusion. The fact that the provisions in question are found in the articles of incorporation as well as in the certificate is not material. The articles were adopted under the general laws of this state relating to the organization of such corporations, and cannot be enforced so far as they are contrary to law.

6. The certificate provides that sums paid on account of disability resulting from an accident shall be deducted from the principal sum to be paid in case of death of the assured. The plaintiff was not entitled to more than $5,000, and the allowance in excess of that sum was therefore unauthorized.

7. The decree of the district court provides that an assessment of two dollars be made upon each member of the association assessable at the time of the accident, and also contains the following: "And defendant's officers are ordered and directed to collect and pay to the plaintiff such proceeds of such assessment, not exceeding said sum of $5,000." There is a similar provision in regard to the assessment and collection of an indemnity of $25. The appellant complains of so much of these provisions as refer to its officers. They are not parties to the action, and are not complaining of the decree. It is not apparent that the appellant will suffer prejudice from the portions of which it complains, since it can only act through its officers and employés, and the effect of the decree is merely to direct the manner in which the amount found to be due the plaintiff shall be raised. The provisions in question really add nothing to the force and effect of the decree, since the officers of the defendant are not in court. The defendant would have been compelled to require them to do what the decree directs as to the $5,000.

8. Questions which we have not specially noticed are presented in argument, but they are unimportant, or are disposed of by what we have said. The amount of the recovery will be reduced by the sum of $25, and as thus modified the decree of the district court is affirmed. Modified and affirmed.

Accord. Fisher v. Merchants Ins. Co. 95 Me. 485, 50 Atl. 282; Phoenix Insurance Co. v. Zlotky 66 Neb. 584, 92 N. W. 736; Baldwin v. Fraternal Accident Ass'n 46 N. Y. S. 1061.

SETTLE v. FARMERS' & LABORERS' CO-OPERATIVE INS. ASS'N OF MONROE COUNTY.

St. Louis Court of Appeals, Missouri. 1910. 131 S. W. 136.

Legality of Assessment.

Nortoni, J. This is a suit on a policy of fire insurance. Plaintiff recovered, and defendant prosecutes the appeal.

Defendant is a farmers' mutual fire insurance company incorporated under the laws of this state, and authorized to insure the property of its members in Monroe county. On August 18, 1906, plaintiff became a member of the company, and defendant issued to him its policy of insurance, whereby, among other things, it agreed to indemnify him against the loss of his barn by fire or lightning to the extent of $250, and not exceeding three-fourths the value of the contents of said barn; the entire amount insured on the contents of the barn being $200. Other items in the same policy made a total amount of $1,350 insured, but the barn and contents only were destroyed. Plaintiff's barn and contents were consumed by fire on the night of August 15, 1907, and defendant declined to pay the loss for the reason plaintiff had omitted to pay an assessment levied against his policy on the 13th of July of the same year. The case was tried before the circuit court without a jury, and defense was made on the theory the policy had been forfeited prior to the date of plaintiff's loss because of the nonpayment of the assessment referred to. Defendant being a farmers' mutual insurance company organized under our statutes, of course, it is without capital other than that which comes into its treasury as a result of a small stipend paid for each $100 insurance at the time the policy is issued, and through such assessments as are levied from time to time by the board of directors for the purpose of paying losses and incidental expenses. The assessments from which defendant derives its revenue are authorized by the constitution and by-laws of the company to be levied by the board of directors under proper circumstances in the manner therein indicated. And the several policy holders of the company by becoming

such mutually agree and contract with each other and the company to abide by and conform to the provisions of the constitution and by-laws touching such matters.

There is no controversy over the fact that plaintiff's loss occurred by fire at the time mentioned, and that he held a policy in the defendant company for $1,350 in amount, $250 of which covered on his barn and $200 on its contents. But it is said his right to enforce the same had been forfeited because of the fact he had failed and omitted to pay an assessment of $2.70 of date July 13, 1907. The constitution of defendant company in one of its sections pointedly provides that, if any member fails or omits to pay an assessment after 30 days' notice thereof, then such failure operates to suspend his policy and forfeit his right to indemnity thereunder. This much is conceded. And it is conceded, too, that plaintiff failed to pay the assessment of $2.70, which was levied on July 13th, within the 30-day limit specified in the constitution, which in part constitutes the contract of insurance between the parties. To avoid the forfeiture set forth in defendant's answer and relied upon as a defense to the action, plaintiff insists that such assessment was illegal, in that it was levied for an amount in excess of that authorized by the constitution of the company and in a manner other and different from that provided therein. The defendant campany, having pleaded a forfeiture of the policy for nonpayment of the assessment, the burden is, of course, upon it to prove that a legal assessment was made. 21 Am. & Eng. Ency. Law (2d Ed.) 289; Hartford L. Ins. Co. v. Hyde, 101 Tenn. 396, 48 S. W. 968. To the end of sustaining the forfeiture, it was shown that on the 1st day of July, 1907, the board of directors of the defendant company ordered an assessment of 20 cents on each $100 insured, and that the secretary on July 13th notified plaintiff that $2.70 was his pro rata part thereof to be paid on or before August 13, 1907. It was further shown that the company then had at risk policies to an amount of something over $2,000,000, and that the returns from such 20-cent assessment would amount to $4,437.38, and, further, that at the time such assessment was made there were outstanding obligations—fire losses and expenses—against the company, pay-

able from such assessments, amounting to a little more than $2,300. Section 2 of article 2 of defendant's constitution provides that no assessment shall be levied except in cases of actual loss or damage by fire or lightning, or to defray the necessary expenses of the association as thereinafter provided. Section 3 of the same article provides that each member shall pay a sum bearing the same ratio to the total amount to be paid as the sum he has insured bears to the total value of the property insured. Section 5 of article 2 of the constitution provides that the board of directors shall adjudicate each loss reported to the company, and that the secretary shall proceed to estimate three-fourths of the amount of said loss, and make out a pro rata assessment of the amount due from each member according to section 3, with 1 per cent. added, and mail the same with proper notice of time of payment to the address of each member. Section 8 of article 8 of the constitution provides that, when the board of directors shall order an assessment, the secretary shall execute the same, and that it shall be signed by a majority of the board of directors and secretary, and placed on file in the secretary's office, and that, when so executed, it shall constitute evidence that the several sums so assessed are due and payable to the company from the persons against whom the same are respectively assessed. It is conceded in the case that, though the assessment of 20 cents on each $100 insured would yield the sum of $4,437.38, the company actually owed only a little more than $2,300 at the time. It is conceded, too, by defendant that no particular calculations were made with reference to levying the assessment referred to for the purpose of paying losses then accrued, but it is said the assessment of 20 cents was made in blanket form for the purpose of liquidating the $2,300 indebtedness then outstanding, and such loss as might accrue thereafter during that year. Though it appears the secretary and a quorum of the board of directors signed the resolution levying the assessment mentioned, it is conceded that the secretary did not extend the same by calculating the amount due from each policy holder, and together with the majority of the board of directors sign and place the contemplated document on file in his office as evidence that the sums so

assessed were due and payable to the company from the persons against whom they were respectively assessed. On these facts the circuit court entertained the view that the assessment mentioned was insufficient to operate a forfeiture of plaintiff's insurance for the reason it was illegal and unenforceable.

In the first place, the constitution of the company, which is parcel of the contract between the parties, authorizes the levy of an assessment only for the purpose of meeting actual losses or damages or to defray the necessary expenses of the association. By section 3 of article 2 each member is required to pay a sum bearing the same ratio to the total amount to be paid as the sum insured bears to the total value of all property insured. These provisions are in accord with the spirit of natural justice, for, besides each bearing his pro rata portion of the burden, it is expressly stipulated that no one shall be called upon to pay an assessment except in case of actual loss or damage or to defray the necessary expenses of the association. The obligation of the policy holder obviously begins with the issue of his policy, and it is for him to pay his pro rata part of all losses that occur during the time of continuing his relations with the company. Pro rata assessments are, therefore, authorized for the purpose of liquidating such losses as have actually accrued at the time the assessment was made, and for the purpose of defraying the necessary expenses of the company. It may be that plaintiff would desire to discontinue his relations with the company after the payment of a given assessment, and, if he chose to do so on the terms otherwise stipulated in the constitution and by-laws, he should not be required to contribute for losses that occur thereafter. The present assessment under the constitution is admittedly levied for the purpose of liquidating the $2,300 then outstanding against the company, and for other losses which might probably accrue during the year thereafter. There is certainly no authority in the constitution or contract of insurance authorizing the levy of an assessment so far in excess of the losses theretofore accrued together with the necessary expenses, and under the established rule of decision the assessment must be regarded illegal.

Forfeitures are not favored in the law, and, before the courts

will declare one, it is essential for the party insisting upon it to show strict compliance with every term said to afford the basis for thus summarily divesting the right. 21 Am. & Eng. Ency. Law (2d Ed.) 289; Lewine v. Sup. Lodge, 122 Mo. App. 547, 560, 99 S. W. 821. It is axiomatic that a forfeiture cannot be declared for failing to pay an assessment which is illegal, and not levied in accordance with the provisions of the charter of the company. 2 Cooley's Briefs on Insurance, 1871; In re People's Mut. Equitable Fire Ins. Co., 9 Allen (Mass.) 319; 21 Am. & Eng. Ency. Law (2d Ed.) 289; Beach on Insurance, § 159. It not only appears that the assessment involved was made in amount nearly twice as great as that authorized by the constitution of the company which was wholly unwarranted, but it appears as well practically all of the details prescribed for levying the assessment were omitted as though they were of no importance whatever. As we interpret the constitutional provisions, it is contemplated that the board of directors shall calculate the amount necessary to meet losses then accrued and defray the necessary expenses after which an assessment should be made for such amount. This assessment should be executed by the secretary of the company by extending the same pro rata against the total amount of property insured. Of course, an error of a few cents or a few dollars would not necessarily render the assessment invalid for the reason that, however diligent, men may not always be precise about such matters, but it is a matter in which all of the policy holders have an interest, and they are concerned to a considerable extent. It is not just to them for the board of directors to proceed in total disregard of the constitutional provisions and levy an assessment in a haphazard manner, without calculation whatever, in an amount far in excess of that essential to defray such obligations as they have undertaken to supply means to discharge. The provisions of the constitution requiring the secretary to execute the assessment by properly extending it pro rata against the various policies and policy holders, and requiring this document to be signed by him and a majority of the board of directors, and placed on file in the secretary's office, is of importance, too, for the purpose of affording a valid basis of forfeiture when

such is sought to be declared. Plaintiff and other policy holders have stipulated with the corporate entity and with each other to the effect that such document so signed and filed in the secretary's office shall be evidence that the several sums so assessed are due and payable to the company from the persons against whom they are assessed. The purpose is obviously to have the assessment and extension overlooked and attested by the directors and secretary in the interest both of equality and accuracy, and such was omitted. Until this is done, there is no valid extension of the assessment as prescribed in the organic law of the company proceeding to levy the same, for there is no authority to levy an assessment and extend it against the policies in a manner other than that prescribed by the charter and by-laws of the company. When the rights of a policy holder are sought to be forfeited for nonpayment, it must be shown that every substantive detail prescribed in the charter for both the levy and enforcement of the assessment are substantially complied with. Until this is done, there appears no valid ground of forfeiture, for the law exacts a greater degree of precision in aid of such matters than that which avails in the ordinary affairs of life. Baker v. Citizens' Mut. Fire Ins. Co., 51 Mich. 243, 16 N. W. 391; Planters' Ins. Co. v. Comfort, 50 Miss. 662; 21 Am. & Eng. Ency. Law (2d Ed.) 289; 2 Cooley's Briefs on Ins. 1871.

At the conclusion of the trial, plaintiff requested the court in writing to make a special finding of facts and conclusions of law under section 695, Rev. St. 1899 (Ann. St. 1906, p. 704). That statute provides substantially that, upon the trial of any question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties requests it with the view of excepting to the decision, in which case the court shall state in writing the conclusions of fact found separately from the conclusions of law. It has been ruled under this statute that the failure of the court to make such separate findings when requested by a party is reversible error, but in that and other cases declaring the rule the court found the issue against the party who had requested the special finding and omitted or declined to make the special finding which the statute enjoins in proper circum-

stances when requested. See Hamill v. Talbott, 72 Mo. App. 22. Defendant made no request whatever on the court for a special finding of facts under this statute, but now complains, and insists, the judgment shou'd be reversed for the reason the court omitted to comply with the plaintiff's request in that behalf. We are not persuaded to the view advanced by counsel, for, as we understand it, it is a rule throughout appellate procedure that one may not predicate error on appeal touching a matter about which he has not brought to the attention of the trial court. Defendant was at liberty to require a special finding under the statute, and, if it had done so, the court would have erred in refusing to accede to the request, but defendant saw fit to waive its right in respect to this matter, and it is now in no position to complain. The court, having found the issue for plaintiff, no doubt proceeded on the theory that plaintiff would not complain even if it gave no special finding of facts and conclusions of law. Plaintiff seems to be entirely satisfied with the judgment, though the court admitted to comply with his request, and we are unable to perceive how defendant can be aggrieved by the failure of the court to make a special finding when it omitted to request it. By the plain terms of the statute, it intends only to confer the right of a special finding when the party requests it with the view of excepting to the decision. Exceptions may be saved or waived as the party desires at the time. If defendant desired a special finding, it should have requested it at the proper time with the view of excepting to the decision. Not having done so, it should be treated as having waived its right in the premises.

The judgment should be affirmed. It is so ordered.

MONTGOMERY COUNTY FARMERS' MUT. INS. CO. v. MILNER.

Supreme Court of Iowa. Jan. 25, 1894. 90 Ia. 685.

Change of By-Laws.

Appeal from the district court, Montgomery county; A. B. Thornell, Judge.

The plaintiff, a mutual insurance company upon the assessment plan, brings this action at law to recover of the defendant, as a member of said company, an assessment made upon a policy held by him for $2,300; said assessment being to pay a judgment in favor of Thomas Weidman, also a member, for $2,012, rendered on account of a loss sustained by him under his policy from the plaintiff. The defendant answered, denying liability upon the following grounds: That plaintiff's articles of incorporation provide that the private property of its members shall be exempt from corporate debts, wherefore said judgment is not binding on defendant's private property; that plaintiff's by-laws provided that no insurance should be binding until the amount of property placed upon its books amounted to $100,000, and that the day on which liability should commence on the first $100,000 of risk taken by the company should be determined by the executive committee; that there has never been to exceed $70,000 of risks taken by the company; that it never had authority to assume any risks so as to bind defendant; that at the time defendant took his policy he was apprised that private property was exempt from corporate debts, and that the insurance could not take effect until there was $100,000 in risks; and that he accepted his policy upon those conditions. He alleges that the judgment in favor of Weidman is fraudulent and void, for that questions of the validity of Weidman's insurance, for the reasons already stated as a defense herein, were not presented as a defense in that case. The jury being waived, the case was tried to the court, and, upon certain findings of facts and conclusions of law made by the court, judgment was entered in favor of the plaintiff

for $12.85 and costs, including $1.28 attorney's fee. Defendant appeals.

Given, J. 1. The only question for us to determine is whether there is error in the conclusions of law announced by the court as applied to the facts of the case. The court found that the exemption of the private property of the members from corporate debts "does not apply to assessments against the members for losses under policies issued by this company, as such assessment is a debt of the individual stockholder, and not of the company." This conclusion is unquestionably correct. It is not the company that owes the assessment sought to be recovered, but the defendant. It does not make his liability a corporate debt, that the assessment may go to the payment of such a debt.

2. The articles of incorporation provide that "there shall be seven managers to conduct said business." The court found "that, as managers of said company, they were the agents of each person who, by applying for insurance, became a member thereof; and such person was bound by the acts of his agents in changing said by-laws, even though he had no actual notice of such change." In the defendant's application for this policy, he agreed as follows: "I hereby agree to pay all just assessments, and be governed in all cases by the by-laws of the association. In case it becomes necessary to collect assessments by law, I agree to pay a reasonable attorney's fee." By this agreement the defendant bound himself to be governed in all cases by the by-laws of the association. The articles of incorporation authorized the managers to "adopt such rules and by-laws as to them may seem proper." In pursuance of this authority, they did, on May 15, 1886, which was prior to the issuing of defendant's policy, amend the by-laws so as to provide as follows: "No insurance shall be binding until the amount of property placed on the books of the company amounts to $50,000." They directed, "as that amount was on hand in signed applications, the secretary was instructed to issue policies on all signed applications." In view of these provisions, and the agreement of the defendant, and the nature and character of the organization of the company, the conclusion of the court as stated is certainly correct. The further

conclusion of law that only one-half of 1 per cent. on the amount of defendant's policy could be recovered during any one year is in exact accordance with the articles of incorporation.

3. There was certainly no fraud in the company's not making the defenses here set up against the claim of Weidman. His policy was issued upon the same kind of app'ication as defendant's, and his contract of insurance was in all respects the same. We think the defenses are not available to this defendant, and certainly would not have been available to the company as against the claim of Weidman.

The questions we have considered are discussed under several heads, and in various phrases, by appellant; but the law of the case is fully embraced in the four conclusions announced by the lower court, and these conclusions—we think, as applied to the facts, are without error. The judgment of the district court is therefore affirmed.

Note. A member renewing his policy is charged with notice of changes in the charter or by-laws made before such renewal. Lyncoming F. Ins. Co. v. Buck, 1 Luz. Leg. Reg. (Pa.) 351. A member is not charged with notice of a change in a by-law not brought to his attention prior to the issuance of his policy. Given v. Rettew, 162 Pa. St. 638, 29 Atl. 703.

HOUDECK v. MERCHANTS & BANKERS INS. CO.

Supreme Court of Iowa. 1897. 102 Iowa 303.

By-Laws. Making. Effect. Premiums. Incumbrance.

Directed verdict for Plaintiff, defendant appeals.

Deemer, J. The issuance of the policy, the destruction of the property insured by fire, and the performance of all the conditions precedent to plaintiffs' right to recover, are admitted. It is also admitted that after the execution of the policy the assured placed two mortgages upon the property, for the sums of $300 and $465, respectively. Appellant had no notice of the

giving of these instruments, and did not consent to the execution thereof. The policy contained this, among other provisions: "This contract shall be void and of no effect, unless consent in writing is indorsed hereon by the president or secretary of the company, * * * if interest of the assured is now, or shall hereafter be, incumbered by any mortgage or lien of any kind. * * *" The defendant pleaded a breach of this condition as a defense to the action. To meet this defense, plaintiffs relied upon (1) a by-law of the company which they claimed modified the terms of the policy, and permitted mortgaging of the property; (2) recognition of the validity of the policy, and negotiations for a settlement, after appellant had notice of the making of the mortgages; and (3) receipt by the company of a part of the premium after the fire, and after knowledge of the alleged breach of condition.

The by-law upon which appellees rely was adopted by the defendant's board of directors, and is as follows: "In all cases of application for insurance, the applicant shall state the true value of the property insured, and also the amount of incumbrance on the same: and should there afterwards, during the life of the policy, be any incumbrance on the property insured, so as to reduce the real interest of the party insured to a sum less than the amount of insurance, and the assured shall neglect to obtain the consent of the company thereto, then said policy shall be void." Appellant says that this by-law is of no validity because the board of directors was given no authority in the articles of incorporation to adopt by-laws; and it cites the familiar rule that, unless the articles of incorporation specifically delegate to the board the power to enact by-laws, such power must remain in, and can only be exercised by, the members of the corporation, as declared in Beach, Corp. § 31, and Ang. & A. Corp. § 327, and cases cited. The answer to this contention is the statute (McClain's Code, § 1692), which gives to directors of insurance companies organized under chapter 4 of title 9 of the Code, relating to insurance companies, whether doing business under the ordinary or mutual plan, the right to ordain and establish such by-laws and regulations, not inconsistent with the charter or with the constitution and laws of the United States or of this state, as

shall appear to them necessary for regulating and conducting the business of the company.

Appellant further contends that this by-law had been abrogated and repealed before the issuance of the policy in suit. There is no evidence of any direct action of the corporation repealing it, but it is claimed that the course of business of the company was such that its abrogation should be inferred. As a general rule, a by-law can only be repealed by the authority which made it, and it cannot be affected by usage contrary thereto. True, the company may, in certain cases, be estopped from setting up a by-law in defense when all the members have assented to its abrogation. But the mere fact that the officers of a mutual company have disregarded a by-law is not sufficient to show its repeal. Nibl. Ben. Soc. & Acc. Ins. (1st Ed.) § 16; Boone, Corp. § 56; Beach, Priv. Corp. § 323. The parties may, in their contract, mutually agree to a waiver of a by-law. It is held by a number of authorities, that, if the policy is inconsistent with the by-law, the latter is deemed to be waived. Davidson v. Society, 39 Minn. 303, 39 N. W. 803; Doane v. Insurance Co., 45 N. J. Eq. 274, 17 Atl. 625; Philbrook v. Insurance Co., 37 Me. 137; Insurance Co. v. Rand, 24 N. H. 428. Without approving this doctrine, it is sufficient to say that there is nothing in the articles of incorporation, so far as shown, prohibiting the agents of the company from making a contract with the conditions appearing in the policy in suit; and it must be presumed that, when the parties agreed to this condition, they did so with express knowledge of the by-law, and for the purpose of adding to the duties assumed by the assured,—that is, of securing the consent in writing of the president or secretary to the mortgaging of the property, no matter what the amount of the mortgage. The by-law does not require the company to pay if the real interest of the assured, after deducting the added incumbrance, is equal to or more than the amount of the insurance; hence the clause in the policy is not really in conflict with the by-law. And as we have said, there is nothing in the by-law or in the articles of incorporation proscribing the making of such a contract.

Appellees contend, however, that the condition was waived by the appellant, by recognizing the policy, and offering to

pay the amount of the loss thereunder, after notice of the breach. The fire occurred on July 14, 1894. On August 1, appellant sent an adjuster to examine into the loss. Appellees gave notice and made proofs of loss on August 31. Some time prior to the 5th day of February, 1895, this suit was commenced. After the commencement of the action, defendant requested appellee Houdeck to go to Des Moines for the purpose of making a settlement or compromise. In response to this, Houdeck went to Des Moines, and had a conference with the vice-president of the company. At this conference an agreement of settlement and compromise was entered into, by which Houdeck, Paulicek, and Lahn (one of the subsequent mortgagees) agreed to accept $100 in full of all claims. This paper was signed by Houdeck alone, and he agreed to get the signatures of the other parties. These others refused to sign, and the agreement was never consummated. Appellees say that this amounted to a recognition of the policy after notice of a breach of condition, and a waiver thereof; while appellant contends that the evidence was and is inadmissible, and of no value, for the reason that it was an attempt at settlement and compromise. There is no evidence to the effect that Houdeck or his co-plaintiff was put to any expense in the matter of this attempted compromise, and the agreement itself recites that it was an agreement of settlement and compromise of a disputed claim. It is uniformly held that an offer of compromise is inadmissible. Home Ins. Co. v. Baltimore Warehouse Co., 93 U. S. 527; May, Ins. 294g; Greenl. Ev. § 192; Richards v. Insurance Co. (Mich.) 47 N. W. 350; Horton, Ins. § 1090. The agreement contained in this offer of settlement has in it no statement or admission of fact in recognition of the validity of the policy which can be divorced from the offer, and made the foundation of a waiver. It seems to us that there was no waiver of the breach of the condition of the policy in this offer to compromise. A jury might have found that appellant was at the time denying all liability, and made the offer, not in recognition of the validity of the policy, but for the purpose of buying its peace.

It is also insisted that the appellant waived the breach of condition for the reason that after the loss, and after knowledge

of the breach, it received, accepted, and retained an assessment paid by appellee upon a guaranty note executed by him for his premium. That it did accept and retain such assessment is conceded, but it was for an assessment due at the time the payment was made, and liability for it accrued during the life of the policy. It had the right to the money, and did not waive the breach of the condition unless it had knowledge thereof at the time it accepted it. There is no evidence whatever to the effect that it had any knowledge of the existence of these subsequent mortgages at the time it accepted the amount of the assessment. It did not waive the breach then by accepting the money. Nor do we think it waived it by retaining the same, for it was under no obligation to return the premium paid before knowledge of the forfeiture. Harle v. Insurance Co., 71 Iowa, 401, 32 N. W. 396; Harris v. Insurance Co., 53 Iowa, 236, 5 N. W. 124; May, Ins. 506. Taking the most favorable view of the evidence as to the waiver, it was a question for the jury, and not for the court, to determine whether the appellant, after notice of the breach of condition, did any act indicating an intention not to rely thereon. For the errors pointed out, the judgment is reversed.

THE TEMPERANCE MUTUAL BENEFIT ASS'N v. HOME FRIENDLY SOCIETY.

40 Atl. 1100. Pa. July 21, 1898.

Transfer and Reinsurance.

Fell, J. The finding of the learned Judge that the consideration for the conveyance of the property in question did not pass to the plaintiff as a corporation, but to such of its members as dissolved their connection with it and became members of the corporation defendant, is fully warranted by the testimony, and it is conclusive of the controversy which has arisen. Both corporations are mutual life insurance associations. The plaintiff had acquired property by the accumulation of receipts for

admission to membership, from annual dues, and from assessments of the members. This property was a trust fund for the security of the certificate holders. It was within the power of the directors to sell this property for the purposes of the corporation, and to use the money received in carrying on its affairs. They could not, however, close up the affairs of the corporation, or transfer its property for the benefit of a portion of its members. This was in effect what they attempted to do. The agreement upon which the conveyance is based provides for the transfer of "the franchises, organization, property and control" of one corporation to the other. It was an attempt to merge one corporation into another, without legislative authority, and without any previous action of the members. That this could not be done is too clear to admit of doubt. Lauman v. Railroad Co., 30 Pa. St. 42; Railroad Co. v. Bowser, 48 Pa. St. 29; Balliet v. Brown, 103 Pa. St. 554.

The conveyance cannot be sustained on the ground that it was the consideration of a contract of reinsurance. No reinsurance was effected or intended. The purpose was to transfer the entire membership and property of one corporation to another, and it was attempted to effect this by the action of the board of directors alone. As the question raised relates to the power of the directors of the corporation to make the conveyance, inquiry as to the consideration upon which it was based is not precluded by the fact that the deed is regular on its face. The plaintiff was attempting to set aside, not its own act, but the unauthorized act of its directors. The judgment is affirmed.

Accord. Mowery vs. Ind. & C. R. Co., 4 Biss; Pearce vs. Madison & I. R. Co., 62 U. S. 21.

Note. 1. Authority may exist in the original organic law of the society. Nugent vs. Putman, 86 U. S. (19 Wall) 241, 22 L. Ed. 83.

Note. 2. Authority may exist by legislation had subsequent to the date of membership. State Treasurer vs. Auditor General, 46 Mich. 224.

L. R. GRAYSON v. P. F. WILLOUGHBY et al.

78 Iowa, 83, 4 L. R. A. 365.

Liability. Illegal Transfer.

In 1884 the plaintiff L. R. Grayson joined an assessment or benefit association or life insurance company, having its principal place of business at Scranton in this state. The defendants constituted the board of directors of said company. This action was brought to recover damages of the defendants for fraudulently dissolving said company, by consolidating it with another corporation, known as the "Iowa Mutual Benefit Association," at Toledo. There was a demurrer to the petition, which was sustained, and plaintiffs appeal.

Rothrock, J. We will, therefore, consider the case as a claim for damages of some kind, made in behalf of Mrs. Grayson. It is claimed by counsel for appellants that the action is founded on section 1071 of the Code. That section, and section 1072, are in these words: "Intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relations to their means or their liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud may also recover damage therefor against those guilty of participating in such fraud. The diversion of the funds of the corporation to other objects than those mentioned in their articles, and in the notices published as aforesaid, if any person be thereby injured, and the payment of dividends which leave insufficient funds to meet the liabilities of the corporation, shall be deemed such frauds as will subject those therein concerned to the penalties of the preceding section, and such dividends, or their equivalent, in the hands of individual stockholders, shall be subject to said liabilities."

Does the plaintiff show, by the averments of her petition, that the defendants are liable in damages to her under these provisions of the statute? It appears that the defunct company created and maintained two funds. One was called the "beneficiary fund," which consisted of all moneys collected on assessments, and to be used only for the payment of beneficiary

claims of members of the association. The other fund was the "general fund," and it consisted of all other moneys. We suppose this general fund was the proceeds of the admission fees and annual dues. It was provided that the general fund should be paid out as ordered by the board of directors or by the executive committee. It is charged in the petition that "defendants herein, as officers and directors of the said association, abstracted and received therefrom large sums of money, the exact amounts of which these plaintiffs are unable to state, and that the said transfer of the said Cosmopolitan Mutual Benefit Association to, and consideration with, the said Mutual Benefit Association was fraudulent, and without any authority of law; and that by reason thereof, and as a consideration therefor, these defendants received further large sums of money, the exact amounts of which the plaintiffs are unable to state,—all of which was and is in gross fraud and violation of the rights of these plaintiffs." At the first reading of the abstract in this case some of us were of the opinion that the plaintiff was not entitled to recover more than nominal damages. But if it be true that the plaintiff has paid one hundred dollars, and has lost her insurance by the acts of the defendants, and the defendants received large sums of money by reason of the consolidation, their act was a gross fraud, and the plaintiff fought at least to recover of them the amount she has paid, and which now appears to be wholly lost to her. We think this must be the extent of her recovery. Any further or other damages would involve an estimate of what the value of a policy in an assessment life insurance company will be several years in the future, or rather, what is the present value of a policy payable in the future. It is apparent that no estimate of its value can be made. It may be worth something or nothing, depending entirely upon whether there shall be any assessable members when the policy shall mature. It is set forth as ground of demurrer that the plaintiff is not entitled to recover damages because she ratified the action of the defendants by applying to the Mutual Benefit Associations for membership in that corporation. Her application was no ratification, such as to estop her from now asserting any claim she may have against the defendants for fraud. We think the demurrer should have been overru'ed. Reversed.

CHAPTER IV.

THE CONTRACT.

HAGEDORN v. OLIVERSON. King's Bench, 1814. 2 M. & S. 485.

Alien Enemy as Insured.

Assumpsit on a policy of assurance tried before Lord Ellenborough, C. J., at the London sittings after Michaelmas Term, when a verdict was found for the plaintiff for £200, the amount of the defendant's subscription, subject to the opinion of the Court on the following case:

The policy was effected by the plaintiff on or about the 2d of August, 1810, as well in his own name as for and in the name and names of all and every other person and persons to whom the same doth, may, or shall appertain, etc., in the usual form, upon the ship "Fiesco," valued at £2,300, at and from Gluckstadt, and any port and ports in the river Elbe, to any port or ports in the United Kingdom, with liberty to carry simulated papers, etc., sail under any flag, etc. The declaration averred the interest to be in F. S. Schroeder, and a loss by capture. At the time of effecting the policy Schroeder was and is a subject of the King of Denmark, then and now at war with Great Britain. In order to legalize the voyage the plaintiff had procured a license, which was granted to him by the name of J. P. H. Hagedorn, of London, on behalf of himself for other British or neutral merchants, permitting a vessel bearing any flag except the French to proceed with a cargo from within certain specified limits, within which Gluckstadt was, to any port of this kingdom north of Dover, etc. The ship was loaded at Gluckstadt in July, 1810, with a cargo on British and neutral account, and sailed from thence under

Danish colors for London on the 26th of that month, and was captured by enemies, carried into a port of Holland, and condemned. The policy was effected for the benefit of Schroeder, but no letter or order was proved from Schroeder before the loss, but a letter from him to the plaintiff, dated the 26th of July, 1812, before the commencement of this action, was produced, wherein he adopted the insurance in the following terms:

"I may now, I hope, expect that you have effected a final settlement with the underwriters per 'Fiesco,' and request you to lay out the amount for me in coffee."

No other evidence was given of the connection of Schroeder with this policy. The question for the opinion of the court is whether the plaintiff is entitled to recover; if the court shall be of that opinion, the verdict is to stand; if not, a nonsuit is to be entered.

Lord Ellenborough, C. J. The difficulty in this case arises from the situation of Schroeder, because he might, by refusing to adopt the policy in case the ship had arrived, have got clear of the premium, for if the plaintiff had brought an action against him to recover it, I do not see how he could have succeeded. That constitutes something of an anomaly, because in one event, namely, that of a loss, he might secure himself, and nevertheless might have avoided the payment of the premium, in the other event of the ship's arrival, by declaring that he chose to stand his own insurer. But I do not think that consideration governs the case now before us between this plaintiff and the underwriter. The plaintiff had a right to effect an insurance, on the chance of its being adopted, for the benefit of all those to whom it might appertain; which are the words of the policy. He might insure for those who were actually interested, and possibly for those who might be interested. Schroeder was interested, and might become privy to the benefit of this insurance by subsequent adoption, according to Lucena V. Craufurd, and Routh V. Thompson. He has adopted it, and now it is made a question whether he can become privy to the benefit of it. It appears to me under those authorities that he may, and may make use of the name of the person at the head of the policy, as the person who had given

the order to effect the insurance, which will satisfy the Stat. 28 Geo. III. c. 56. It seems to me, therefore, that this action is maintainable for the benefit of Schroeder, who was interested at the time, and has become privy by adoption.

Le Blanc, J. The difficulty thrown in the way of the plaintiff has been this, that if Schroeder, in the event of the ship's arrival, had chosen to repudiate instead of adopt the contract, he might have done so, and there would have been no means of coming upon him for the premium. But this policy was effected for the benefit of all persons interested, and Schroeder was a person interested; and I take it, that after the ship sailed on the voyage insured, the plaintiff was bound by the insurance, and could not have recovered back the premium from the underwriter, by averring that this was a policy without interest; the answer would have been Schroeder is interested; and he may elect to adopt the insurance. I therefore conceive the underwriter would have had a right to retain the premium. Then Routh V. Thompson is, I think, an authority to show that Schroeder being interested might subsequently adopt the insurance made by the plaintiff. There the crown adopted it after a loss; and the distinction taken in that case, that the party making the insurance was appointed by the captors who had no insurable interest, and therefore, that he stood in the relation of agent on the part of the crown, whose agents the captors were, does not, I think, make any difference. Here the plaintiff was not unconnected with the insurance; he obtained a license and made insurance for the benefit of the owners, though without communicating with them. Schroeder, who is an owner, afterwards adopted it. That case is an authority to show that he might afterwards adopt it. This, it must be remembered, is a question between the plaintiff and the underwriter, and not Schroeder and the underwriter; and unless we saw that the underwriter would not have been entitled to retain the premium, we cannot say that the plaintiff is not entitled to his contract, unless it could be shown that this is a mere gaming policy.

Bayley, J. I think this is a case in which the defendant ought to pay, and the plaintiff ought to receive for a loss under the policy. A loss has happened, upon which the defendant

undertook to pay, and if the premium could not have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. I think the plaintiff never could have recovered back the premium from the underwriter, because of the uncertainty whether Schroeder would adopt the assurance, in respect of which the underwriter would have incurred the risk. While the contract was in fieri there was not any disposition on the plaintiff's part to have the policy vacated, and if there had been, it would have been an answer to him, that Schroeder might have adopted it. Then comes the question whether Schroeder is entitled to take the benefit of this insurance. It is stated that it was effected for his benefit, therefore it was intended to cover his specific interest at the time. Schroeder had an interest at the time, and although there was not any specific communication at the time, yet as Schroeder was connected in the concern, it was reasonable for the plaintiff to expect that Schroeder would adopt an act which could be done with no other view than for his benefit. Schroeder must be considered as under a moral if not a legal obligation to adopt it, although the ship arrived. Being under that obligation in all events, he thinks that he is warranted in adopting it even after a loss, and has adopted it. The case of Routh v. Thompson shows that if a policy be effected with reference to the benefit of a person interested, an adoption of it by such person after the loss will be sufficient.

Dampier, J. The plaintiff placed himself in an awkward situation by advancing his money for the premium, upon the expectation that Schroeder would adopt his act, which Schroeder might have refused to do in the event of the ship's arrival; and if he had, I do not see that the plaintiff could have recovered back the premium. The question then is whether Schroeder had an interest in the policy. He was owner of the ship, and the policy was effected for his benefit; that seems to me to give him an interest. If then he had an interest his subsequent adoption will be good. Routh v. Thompson is a full and clear authority to that point; there the agency was only a constructive agency, and it does not appear to me to afford any distinction, because the insurance

did not come within the scope of his agency. Therefore it seems to be to govern this case; there is no distinction in reason though there may be a difference. All the averments in this declaration are certainly fully proved, and therefore the plaintiff is entitled.

Judgment for the plaintiff.

MATTOON MANUF'G CO. v. OSHKOSH MUT. F. INS. CO.

Supreme Court of Wis. Nov. 1, 1887. 69 Wis. 564.

Essential Elements of the Contract.

Orton, J. This suit was instituted by the respondent company to recover $5,000 insurance, by virtue of a contract of insurance between the parties, made on the twenty-fifth day of August, 1886, on account of loss by fire occurring on the tenth day of September, 1886. The pleadings are such that only one single issue was presented, and that was whether there was any contract of insurance between the parties, or whether the facts proved constituted a contract of insurance. It was stipulated by appellant's counsel that the circuit court in which the action was tried might direct a verdict for either party, as it might be advised from the evidence, and that the only error that the appellant can assign will be a matter of law arising upon the finding that there was a contract upon the facts proved. This seems to be the effect of the proposition made by the learned counsel of the appellant, found in the record. The court thereupon overruled the motion of the defendant to direct a verdict in its favor, and directed the jury to find a verdict in favor of the plaintiff for the sum of $4,800, with interest on that amount from the fourteenth day of September, 1886, and the defendant's counsel excepted to both rulings. The defendant's counsel thereupon made a motion for a new trial on the minutes, on the ground that said verdict

is contrary to the law and the evidence, and excepted to the overruling thereof.

It is substantially stated in the complaint that about the twenty-fifth day of August, 1886, the respondent *gave its note* to the appellant for $1,000, payable in installments at such times as the appellant might order or assess, with a blank application annexed thereto, duly signed by the respondent; and that the same was accepted by the agent of the appellant with the understanding and agreement *that the same would effect a contract of insurance,* and that such agent should fill out, or cause to be filled out, the blanks in said application and note, in accordance with the facts relating to the ownership of the property to be insured, *with a description of the risk,* of which a printed form, issued by the respondent for such purposes, *was then and there exhibited* to the appellant's said agent; and that thereupon a written policy of insurance for such time and for such terms, in accordance with such agreement, should be made by said appellant, and *forthwith* delivered to the said respondent. It is further stated in the complaint that said note and application were by said agent forwarded to, and are in the possession of, said appellant, and said agreement was duly reported to said appellant, and said appellant duly accepted of said risk, and notified the respondent thereof, but has neglected to send the written policy so promised to the respondent, and continued to so neglect, even after the fire, to send or deliver the same to the respondent, and refuses all liability in the premises. These statements are followed with the proper statements of the loss of certain property by fire, and of demand and refusal of payment, etc.

It is very clear that these facts make a complete, subsisting, and valid contract of insurance, without the written policy that the appellant company so neglected to send or deliver to the respondent. (1) It is alleged that the appellant gave its note of $1,000 for such insurance; (2) that there was an understanding and agreement, upon the acceptance of said note and application by the appellant, that the same would effect a contract of insurance, and that the agent should fill out the blanks therein as to date; (3) that said agent should fill out said application with a description of the risk, of which the printed

form was then and there exhibited to said agent; and (4) that thereupon a written policy of insurance, for such time and terms, should be made out and delivered forthwith to the respondent; (5) that the appellant neglected, and still neglects, to do these things; and (6) that the appellant duly accepted of said risk, and notified the respondent thereof. These allegations are necessary and vital to make the contract of insurance perfect and complete.

These important allegations were virtually denied in the answer, and it is substantially alleged that the note was in blank as to date; and the application was in blank as to date, and the description of the property to be insured, contained in a form to be *thereafter* made and furnished to the appellant by the respondent; and that such form was never furnished to the appellant until after the loss by fire had occurred.

In this connection it is proper to say that it is claimed on behalf of the appellant that, admitting the facts stated in the complaint to be true, there was no contract of insurance, because there had been no payment of the first installment of the said note, as the first year's premium on said risk, according to a by-law of said appellant company, that makes it liable only after such payment as a condition precedent. It seemed to be customary for said company to demand and receive such one year's premium on the delivery of the policy; and there is in evidence a policy made out and delivered, bearing date the twenty-fifth day of August, 1886, the date of the application in that case as well as in this, to the Halstead & Whiffin Manufacturing Company, by this same insurance company, for $5,000 on the main building, and three classes of property as the contents thereof, and said premium of $200 was demanded and paid at the time of such delivery. George B. Mattoon was the president of both companies, and made the application in both cases. In that case the description of the particular property to be insured was furnished by the respondent to said company at the time of the application, and inserted therein, and everything was done to make a valid contract of insurance, before the actual issue of the policy, which was to be antedated to agree with the time of the application. This policy of insurance to another company, and the facts concerning the

same, were introduced in evidence, against the objection of the appellant. But it certainly serves to illustrate the manner in which such business was done by both companies at the time, and when a contract of insurance was deemed fully completed. The terms of the note given in such a case, and in this case, would seem to determine the question of the payment of any and all of the installments thereof. The $1,000 is payable *by installments at such time as the directors of said company may order and assess.* If such a note is given, and everything else done to make a valid contract of insurance, we cannot say, as a matter of law, that the first year's installment of such a note must be paid to make the company liable, unless the company had so *ordered and assessed* before the contract was otherwise completed. So we say, if everything stated in the complaint had been done, the contract of insurance was complete although such first year's installment had not been paid, because not so ordered and assessed.

There is very little substantial difference between the testimony of Mattoon, the president of the respondent company, who made the blank application and note, and of Mather, the agent of the appellant company, who received and transmitted the same to said company. Wherein there is any disagreement will be observed in passing. The facts appear to be as follows:

The applications for insurance, in both cases, were made at the same time. In the case of the Halstead & Whiffin Manufacturing Company, the application and note were filled out and signed at the time. The witness Mattoon testified that "he told the agent that he wanted the $5,000 to cover that risk, (the factory and contents) but that he did not know which he would place it all on,—machinery, building, or stock,—but they were just taking an inventory." The treasurer of the company, Paltzer, handed the agent a printed "form" that had been used in other cases, containing buildings and factory, the size and location thereof, the amount of machinery, building, and stock to be insured. The object of awaiting such inventory appears to have been to make out a specific "form" similar to that exhibited, containing a description of the building, and the particular contents thereof, classified in certain amounts to make up

the $5,000. This was to be the description of the property to be filled in the written application, after such inventory had been made, and such form furnished. It seems, also, that this particular building, and the contents thereof, had already been insured in other companies to the amount of over $60,000, and so classified. In explanation of this, said witness testified: "I told him, when we got the inventory figured up, if *we were short on machinery or stock,* that I would put it on *that,*—divide it up; and he [agent] said that would be all right." When asked if he referred to filling out the "form" with the amount of insurance on each kind of property, which was not done at that time, he replied: "It was understood that it should be done." "That form was made out three days after the fire." "No form was made out and sent until it was made out and sent (with a letter to the company) three days after the fire," (which occurred on the tenth day of September, 1886.) "It was left with them to make it, until [after] we get our inventory fixed, *until we could see where we were short.*" The blank note in evidence, which was signed by the respondent, had no date, and was as follows: "OSHKOSH, WISCONSIN, ———188—. For value received in policy No. ———, dated the ——— day of ———, 188—, we promise to pay," etc. The application prefixed to the note is as follows: "Application of [respondent company] for insurance in [appellant company] in the sum of five thousand dollars, against loss or damage by fire and lightning *on the property below specified,* for the term of five years from the ——— day of ———, 188—, to-wit, ———." This blank left for a description of the property is followed by questions and answers in respect to the property to be inserted in the same; the first being as follows: "Are you sole owner of the property to be insured, (exclusive of the land?) *Answer.* Yes." This note and application so left in blank were forwarded to the company by the agent, Mather, with a letter dated August 25, 1886, and at said date saying: "Inclosed find application [of] the Mattoon M. Co., to be held until they send you the form they are getting up,—some new ones. [Signed] J. H. MATHER." These were all the papers or advices the appellant company ever received until after the fire.

The witness Mattoon further testified: "I think it was three days after the fire, the 13th, when I made up the apportionment on the various specific items of property, as set forth in Exhibit H." "Then, when we made up the apportionment or the forms, we placed it where we pleased; that is a privilege I had when I gave the insurance, and I could place it where I saw fit." This apportionment or form, which was to contain a specific description of the property insured, and which was so furnished after the fire, was, in effect, $500 on the buildings, describing them; $1,500 on machinery, shafting, etc.; $3,000 on stock, raw, wrought, and in process, etc. The appellant company was furnished, for the first time, the day after the fire, with a list of the companies in which the factory and contents had been insured, with the particular description of the property insured in each company, and the amounts of insurance upon each class of the property. At the bottom of this schedule or list is appended the following note, viz.: "The Oshkosh Mutual has accepted a risk of $5,000 on this property, *but it has not yet been apportioned between 'building,' 'machinery,' and 'stock,' and no policy yet issued.*"

The agent, Mather, who was called as a witness for the respondent, testified that he called at Mattoon's office, and applied for some insurance, as he said he would give him some; that Mattoon replied that they were not prepared to fix it then, as they were taking stock; and they showed him a form similar to that exhibited to witness, and he understood that they were getting up some new ones, and as soon as they got them out they would send them to the company. The witness then proposed that they would make out a blank application then, leaving the date blank, fill the note out, and leave the date blank, and when they got their forms ready they would send them to the company, and that they could then make out a policy, and date it, and fill in the date of the note and application to correspond. The witness further stated that Mattoon consented to this arrangement, and signed the note. The witness Mattoon did not deny this version of the matter, when re-examined, except that there was nothing said about dating the note or application.

On the ninth day of September, the day before the fire, the

secretary of the appellant company wrote to the respondent to send on the "forms" to be inserted in the policy, and that the policy would be sent by return mail, and yet none were furnished until three days after the fire.

This is all the material evidence in the case.

The circuit court directed a verdict for the plaintiff for $5,000; less, as is supposed, the $200, the first installment of the note and first year's premium.

It seems to us that these facts, viewed in the most favorable light for the respondent, fall far short of making a contract of insurance. (1.) No policy of insurance was ever issued, nor could it be issued, by reason of a want of description of the property to be insured; and neither the note nor application was ever completed, and could not be, for the same reason. (2.) Neither party could have understood that the contract was completed and valid on the twenty-fifth day of August, 1886, or the note would have been dated on that day, as well as the application, and everything done, except the specific description of the property, which was not deemed material, and left to be inserted by the respondent in the application and policy at any time before or after the fire, as a matter of mere form; or why was not the policy issued on the "factory and contents," and sent to the respondent to insert a special description of the property insured, at its leisure? (3.) The respondent was never bound by its note or application, or by any of the conditions of the policy, before the fire or since, and, of course, neither was the appellant bound by any pretended agreement on its part. (4.) Both parties saw fit to make the contract and policy depend upon the respondent's furnishing the description of the property that it wished to have insured, as a condition precedent to the issuing of the policy. (5.) The respondent reserved the right to have the insurance placed upon property that was "short of insurance" in other companies, and to make an inventory in order to ascertain that fact, and to have such property inserted in the application and policy, and thereby prevented a consummation of the contract. (6.) The description of the property to be inserted in the application and policy was not immaterial, because both parties saw fit to make it material by

their contract. (7.) As the matter stood before the fire, there was no consideration whatever for the risk. All that the appellant company had ever received from the respondent was this blank note and blank application, with the request to "hold them" until the "forms" are sent on. (8.) The appellant company could make no assessment of the cash premium to be paid on this blank note, according to section 1907, Rev. St., and according to the condition of such notes themselves. (9.) The apportionment of the insurance was the right of the respondent, and it had not exercised that right. (10.) The appellant company had never acted upon the application, or been called upon to act, but awaited its completion according to directions.

By the simple elements or elementary principles which constitute a contract, here was no contract. (1.) Important and material things were left to be done. (2.) The minds of the parties had never met upon the subject-matter of the contract, or property to be insured. (3.) There was no mutuality or consideration in the unfinished state of the negotiation, and no promise or undertaking on the part of the appellant company to insure any certain property. (4.) There must be subject-matter to which the policy could attach. (5) The amount of indemnity must be *definitely* fixed. (6.) The *duration* of the risk must be definitely fixed, also. When did this risk commence, and when was the end of the five years? (7.) The premium of cash or note, as the consideration of the risk, must be agreed upon, and fixed as a *valid charge against the insured*. These requisites of a contract of insurance without a written policy are all wanting in this case, and if either of them is wanting there is no valid contract. 1 Wood, Fire Ins. § 5, and note. "If anything is left open or undetermined, so that the minds of the parties have not met, no contract exists;" (Id. § 6, and note; *Strohn* v. *Insurance Co.*, 37 Wis. 625;) "or where the *apportionment* of the risk has not been agreed upon," (Id.; *Sandford* v. *Insurance Co.*, 11 Paige, 547;) "or if anything remains to be done by the insured, as a condition precedent," (Id.; *Thayer* v. *Insurance Co.*, 10 Pick. 326;) "or if, upon the whole evidence, it is left in doubt whether a binding contract was really made, a recov-

ery will not be permitted;" "the details of the contract must be fixed," (Id.; *Hughes* v. *Insurance Co.*, 55 N. Y. 265;) "or where the assured had the right to determine how the risk should be apportioned, no recovery for the loss could be had," (*Sandford* v. *Insurance Co., supra;*) "or if the contract is not so far perfected that the insurer could maintain an action for the premium, no perfect agreement exists, and the insurer is not liable," (*Id.; Wood* v. *Insurance Co.*, 32 N. Y. 619.) A case very much in point is cited by the learned counsel of the appellant, (*Kimball* v. *Insurance Co.*, 17 Fed. Rep. 625,) resting upon the want of an apportionment of the risk.

But this transaction is so wanting in all of the elements of a perfect contract, it would seem to be supererogation to cite further authorities. Among other numerous authorities cited by the learned counsel of the respondent to support this contract, there are none applicable to such a case. Here, everything was left *blank* and unperfected, to await the apportionment to be made by the respondent, as to fix the date, and consequently the duration, of the risk, and the liability of the respondent upon the note, or for the premium to be paid, and to complete a valid application for insurance. I do not believe that any case can be found so wanting in nearly all of the elements of a contract of insurance, and, much less, in which such facts are held to have constituted a perfect and valid contract. There may have been cases in which the contract was held to be valid and complete where the apportionment was not made by the parties, but they were such that certain known property was insured, and the law could make the apportionment from *data* furnished by the contract, or the circumstances of the case. Such was the case of *Fitton* v. *Insurance Ass'n*, 20 Fed. Rep. 766, cited by the learned counsel of the respondent.

There was something said about the policy covering the "factory and contents," but the appellant company never knew or heard of any such thing; and the application made out by the respondent, to be forwarded by the agent to the company, was a blank to any and all property to be insured, and remained so until after the fire, and the company never knew what property the respondent wished to have insured.

It is too clear for further consideration that there was no contract, and we think the circuit court erred in the law in finding from these facts that there was.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Accord, Strohm v. Hartford Fire Insurance Company, 37 Wis. 625; Tyler v. New Amsterdam Fire Insurance Co., 4 Rot. (N. Y.) 157; Cleveland Oil & Paint Mfg. Co. v. Norwich Union Fire Ins. Co., 34 Ore. 228, 55 Pac. 435; Milwaukee Mechanics' Ins. Co. v. Graham, 181 Ill. 158; Piedmont & A. Life Ins. Co. v. Ewing, 92 U. S. 377-382.

WILLIAM H. TAYLOE, Appellant, v. THE MERCHANTS' FIRE INSURANCE COMPANY OF BALTIMORE.

Supreme Court of the United States. 9 Howard 390, 13 Law Ed. 187.

Consummation of Contract. Offer in Mail. Dual Capacity of Agent.

Mr. Justice Nelson delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the court below was this: William H. Tayloe, of Richmond County, Virginia, applied to John Minor, the agent of the defendants, residing at Fredericksburg in that state, for an insurance upon his dwelling-house to the amount of $8,000 for one year; and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of the 25th November, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at seventy cents on the thousand dollars, the premium amounting to the sum of fifty-six dollars. The agent stated in the application to the company the reason why it had not been

signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following; and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of the 2nd of December, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for $57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe until the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the mean time, on the 22nd of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent; and refused to issue the policy, or pay the loss.

A bill was filed in the court below by the insured against the company, setting forth, substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

1. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is, that the contract of insurance was not complete at the time the loss happened, and therefore, that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defense.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The nonpayment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice; and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is, to leave the property of the insured uncovered until his acceptance of the offer has reached the company, and has received their assent; for, if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of the opinion that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but the carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due

course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view, in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show, that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on the 21st December, 1844, the company, of course could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its

consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried further in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company.

For why make the offer, unless intended that an assent to its terms should bind them? And why require any further assent on their part, after an unconditional acceptance by the party to whom it is addressed?

We have said that this view is in accordance with the usages and practice of these companies, as well as with the general principles of law governing contracts entered into by absent parties.

In the instructions of this company to their agent at Fredericksburg, he is advised to transmit all applications for insurance to the office for consideration; and that, upon the receipt of an answer, if the applicant accepts the terms, the contract is considered complete without waiting to communicate the acceptance to the company; and the policy to be thereafter issued is to bear date from the time of the acceptance.

The company desire no further communication on the subject, after they have settled upon the terms of the risk, and sent them for the inspection of the applicant, in order to the consummation of the bargain. The communication of the acceptance by the agent afterwards is to enable them to make out the policy. The contract is regarded as complete on the acceptance of the terms.

This appears, also, to have been the understanding of the agent; for, on communicating to the insured the terms received from the company, he observes: "Should you desire to effect the above insurance, send me your check payable to my order for fifty-seven dollars, and the business is concluded"; obviously enough importing, that no other step would be necessary to give effect to the insurance of the property upon the terms stated.

The cases of Adams v. Linsdell (1 Barn. & Ald., 681), and Mactier's Adm'rs v. Frith (6 Wend., 104), are authorities to show that the above view is in conformity with the general principles of law governing the formation of all contracts entered into between parties residing at a distance by means of correspondence.

The unqualified acceptance by the one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain, from the time of the transmission of the acceptance.

This is also the effect of the case of Eliason v. Henshaw (4 Wheat., 228), in this court, though the point was not necessarily involved in the decision of the case. The acceptance there had not been according to the terms of the bargain proposed, for which reason the plaintiff failed.

2. The next position against the claim is the nonpayment of the premium.

One of the conditions annexed to the policies of the company is, that no insurance will be considered as made or binding until the premium be actually paid; and one of the instructions to the agent was, that no credit should be given for premiums under any circumstances.

But the answer to this objection is, that the premium, in judgment of law, was actually paid at the time the contract be-

came complete. The mode of payment had not been prescribed by the company, whether in specie, bills of a particular bank, or otherwise; the agent, therefore, was at liberty to exercise a discretion in the matter, and prescribe the mode of payment; and, accordingly, we find him directing, in this case, that it may be paid by a check payable to his order for the amount. It is admitted that the insured had funds in the bank upon which it was drawn, at all times from the date of the check till it was received by the agent, sufficient to meet it; and that it would have been paid on presentment.

It is not doubted, that, if the check for the premium had been received by the agent from the hands of the insured, it would have been sufficient; and in the view we have taken of the case, the transmission of it by mail, according to the directions given, amounts, in judgment of law, to the same thing. Doubtless, if the check had been lost or destroyed in the transmission, the insured would have been bound to make it good; but the agent, in this respect, trusted to his responsibility, having full confidence in his ability and good faith in the transaction.

II. Another objection taken to the recovery is, that the usual preliminary proofs were not furnished, according to the requirement of the seventh article of the conditions annexed to the policies of the company. These are required to be furnished within a reasonable time after the happening of the loss. The fire occurred on the 22d of December, 1844, and the preliminary proofs were not furnished till the 24th of November, 1845. This was, doubtless, too late, and the objection would have been fatal to the right of the complainant, if the production of these proofs were essential to the recovery.

But the answer is, that the ground upon which the company originally placed their resistance to the payment of the loss, and which is still mainly relied on as fatal to the proceedings, operated as a waiver of the necessity for the production of the preliminary proofs; and that is, that no obligation to insure the loss was ever entered into by the company, the contract being incomplete at the time it occurred. On this ground they refused to issue the policy, which would have imposed upon the insured a strict compliance with its conditions; or to

recognize any obligations arising out of the arrangement between him and their agent.

The objection went to the foundation of the claim, which, in connection with the refusal to issue the policy, superseded the necessity of producing these proofs; as the production would have been but an idle ceremony on part of the insured, in the further prosecution of his right. Why produce them after the company had denied the contract, and refused the policy?

The case of the Columbian Insurance Company v. Lawrence (2 Peters, 25) has been referred to on this point. An objection was there taken, on the trial, to the sufficiency of the preliminary proofs, on the ground that the certificate of the magistrate was not in conformity with the ninth article of the conditions. The particular objection had not been taken by the company when the proofs were furnished, although several others had been, to their liability; and the court left to the jury the question, among others, whether the company had not thereby waived the objection to the sufficiency of the certificate.

The plaintiff recovered; and on the motion for a new trial, among other grounds assigned for granting it, was this instruction of the court. It was held that there was no evidence in the case from which the jury could properly infer a waiver.

The preliminary proofs had been presented to the company on the 16th of February, 1824, soon after the loss. The suit was discontinued, and a new certificate procured from the magistrate correcting the defects in the first, and furnished to the company, on the 14th of February, 1829, five years after the first had been delivered. A new suit was brought, and the case as reported the second time will be found in 10 Peters, 507.

On the second trial, the objection was taken that the certificate had not been produced within a reasonable time after the loss; but the court held otherwise, placing their decision upon the ground that the laches were not properly imputable to the insured, but to the company, on account of their neglect to give notice of the defect when the first certificate was presented, and of the mistaken confidence which the party had placed in them. The court say: "If the company had contemplated the

objection, it would have been but ordinary fair dealing to have apprised the plaintiff of it; for it was then obvious that the defect might have been immediately supplied; as it was, the company, unintentionally it may be, by their silence m'sled him."

It is manifest, on an examination of the two cases, that the doctrine of the first on this point of waiver was virtually overruled, for, if maintained in the second, it would have upheld the ruling at the circuit in the first. The reasons given in support of the corrected certificate, procured and furnished some five years after the loss, are cogent and unanswerable in favor of the position that the conduct of the company in not objecting to the defect in the first one, at the time it was furnished, operated to mislead the party, and should have been regarded as a waiver of the objection.

The cases are very full upon this point, and clearly establish the position that the preliminary proofs, under the circumstances stated in this case, were dispensed with by the company, as inferable from the ground upon which they placed their denial of liability. (9 Wend., 165; 25 Ib., 378, 382; 6 Harr. & Johns., 412; 6 Cow., 404.)

III. It has also been objected, that the plaintiff had an adequate remedy at law, and was not, therefore, under the necessity of resorting to a court of equity; which may very well be admitted.

But it by no means follows from this, that a court of chancery will not entertain jurisdiction. Had the suit been instituted before the loss occurred, the appropriate, if not the only remedy would have been in that court, to enforce a specific performance, and compel the company to issue the policy. And this remedy is as appropriate after as before the loss, if not as essential, in order to facilitate the proceedings at law. No doubt, a count could have been framed upon the agreement to insure, so as to have maintained the action at law. But the proceedings would have been more complicated and embarrassing than upon the policy. The party, therefore, had a right to resort to a court of equity to compel the delivery of the policy, either before or after the happening of the loss; and being properly in that court after the loss happened, it is

according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand.

Such relief was given in the case of Motteux v. The London Assurance Company (1 Atk., 545) and in Perkins v. The Washington Insurance Company (4 Cow., 646). (See, also, 1 Duer, 66 and 110, and 2 Phillips, 583.)

As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And, no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in proceedings at law.

IV. It is further objected, that, admitting the claim to be properly enforceable in equity, still the complainant is not entitled to the relief sought, on the ground that the bill contains no sufficient statement of the contract, or of the performance of the conditions, and also for want of a proper prayer.

We are of the opinion that these several objections are not well founded. The contract as set forth we have already considered, and held complete and binding on the company; and further, that the denial of having entered into the agreement, and refusal to issue the policy, also set forth, are sufficient ground upon which to infer a waiver of the production of the preliminary proofs, as a condition of liability; and if sufficient ground to infer a waiver, it was of course unnecessary to set forth these proofs in the bill. And as to the prayer, it is sufficient to say that the prayer for general relief which is here found will enable the court to make such a decree as the complainant may show himself entitled to, upon the facts set forth in the stating part of the bill.

The pleading is not very formal, nor very cautiously drawn, and, in the absence of the prayer for general relief, might have led to embarrassment in making the proper decree in the case.

There is a specific prayer for a decree for the loss, but it would have been more formal and appropriate, regarding the ground of a prayer for a specific performance of the agreement to insure.

But the particular relief permitted under a general prayer, where the statement in the body of the bill is sufficient to entitle the party to it, meets the difficulty suggested, and well warrants the decree proposed to be entered. (Story, Eq. Pl., secs. 41, 42, and cases.)

Upon the whole, without pursuing the examination further, we are of the opinion that the decree of the court below should be reversed, and that the cause be remitted, with directions to the court to take such further proceedings therein as may be necessary to carry into effect the opinion of this court.

Mr. Justice Catron stated from the bench, that he objected to a decree being made by this court on the bill, because the cause came here by a transfer from the Circuit Court, never having been heard there. It was only prepared for hearing, and is now presented and heard as an original cause in this court. We have appellate and not original jurisdiction in such cases, both by the Constitution and by the Judiciary Act of 1789. Before an appeal can be prosecuted, something must be adjudged to appeal from. And in the second place, if it be once established that causes can be sent here by mere transfer, nothing having been decided below, we must be overwhelmed by such causes, there being now thirty courts and more that may send them up. This is one evil intended to be avoided by the framers of the Constitution, when the Supreme Court was excluded from the exercise of original jurisdiction in cases like the present.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed with costs; and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to that court to take such proceedings

therein as may be necessary to carry into effect the opinion of this court.

Cited—17 How., 455; 19 How., 323; 4 Otto, 45, 631; 6 Blatchf., 249; 15 Blatchf., 37, 511; 4 Biss., 361; 3 McAr., 458; 6 Sawy., 394; 7 Sawy., 21; 9 Ben., 482. Accord. Evans v. Home Ins. Co., 94 U. S. 621; Western v. Genesee Mut. Ins. Co., 2 Kern (N. Y.) 258.

Contra. Held that contract is not consummated until the letter is received, or until the acceptance of the proposal is in some way brought to the knowledge of the other party. McCullough v. Eagle Ins. Co., 1 Pick. (Mass.) 278.

HAGAN v. SCOTTISH UNION NAT. INS. CO.

Supreme Court of the United States. 186 U. S. 423, 46 Law Ed. 1229.

Writing Controls Printing.

Mr. Justice Peckham, after statement of facts, delivered the opinion of the court:

The decision of this case turns upon the significance to be given to the written provision of the policy which provides for insuring "Peter Hagan and Company for account of whom it may concern."

In the district court Judge McPherson said:

"The decision of the case depends upon the effect to be given to the words 'for whom it may concern.' This clause, so far as it may be in conflict with other language in the policy, must, upon familiar principles, be regarded as dominant. It expresses the special agreement of the parties, for it is in writing, while the conflicting provisions are in print; and general printed conditions usually give way to deliberately chosen written words. Moreover, even if the court doubted which provision should prevail, another well-known rule requires the policy to be construed against the company rather than against the insured; and, therefore, upon either ground, the clause now under consideration is controlling. * * * The

first step, therefore, in a given case is to determine what interest the person taking out the policy intended to protect. It is not essential that he should have had any specific individual in mind. It is enough if he intended to protect the interest that afterwards passed to the person injured; and if he so intended, the policy may be adopted afterwards by a subsequent sole or partial owner of the interest, although such owner may have been unknown to the person taking out the insurance, or to the company, at the time the policy was written. In the present case I have no doubt (and I find the fact to be) that Hagan intended to insure, and to keep insured for one year, the entire title to the boat. He did not intend merely to protect such interest as he himself might have from time to time. If this had been his object the policy would more naturally have been taken out in his own name, omitting the qualifying phrase. But he intended to protect the ownership of the boat, whether vested in himself alone, or shared with, or transferred to, other persons. This being his intention, and Martin having afterwards adopted the policy by the agreement of sale and by accounting for a proper share of the premium, I think no further difficulty exists. The facts bring the dispute within the rule laid down in Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219, and in other cases to which reference need not be made."

The decree of the district court was reversed by the circuit court of appeals, with directions to dismiss the libel with costs. Judge Dallas, speaking for that court, said: "It is true that the written terms of the policy will control where they are in plain conflict with its printed clauses; but no part of the instrument is to be rejected if it can be maintained as a whole, and in the present instance the printed provisions in question and the written words "for account of whom it may concern," are not irreconcilably repugnant. That the policy was issued for account of whom it might concern is undeniable, but whom could it concern? Possibly the then existing or future creditors of the boat, or perhaps the constituents of Peter Hagan & Co; but, no matter for whose account the insurance may have been effected, it cannot be supposed that it was taken for the benefit of anyone who, by the

express, though printed, terms of the contract, was distinctly excluded from having or acquiring any interest under it. It is not necessary to our conclusion that we should question the rule of law which was applied by the court below, and we do not do so. It is not doubted that a policy in the name of a special party, on account of whom it may concern, will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known; but we find nothing in this case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein. On the contrary, we think, as we have already said, that the retention in the policy of the provision that it should be entirely void if any transfer in interest, title, or possession should be made, absolutely precludes the inference of an intent to make the policy applicable to any person claiming under or by virtue of such a transfer."

In these two extracts from the opinions delivered in the courts below we find that different views of the judges of those courts upon the question at issue. It is to be observed, in the first place, that the policy in question covers property on the water, viz., a tug boat, yet the printed portion of the policy shows that it was intended generally to be used for insuring property on land. A marine policy was made out upon blanks not intended for that kind of insurance. Consequently many of the printed provisions were wholly inapplicable to insurance of property on the water.

Where a marine policy is thus taken out upon a blank policy providing by many of its terms for insurance on property or goods on land it becomes doubly important to keep, and apply with strictness, the rule that the written shall prevail over the printed portion of a policy, as in such case the written, even more clearly than usual, will evidence the real contract between the parties. Courts will not endeavor to limit what would otherwise be the meaning and effect of the written language, by resorting to some printed provision in the policy, which, if applied, would change such meaning and render the written portion substantially useless and without application.

In Dudgeon v. Pembroke, decided in the English House of Lords, in 1877, L. R. 2 App. Cas. 284, at 293, in speaking of this question of the difference between the written and the printed portions of a policy, and in delivering the opinion of the court, Lord Penzance said:

"My lords, the policy in this case is a time, and not a voyage, policy, and not only so, but an ordinary time policy. There can, I apprehend, be no doubt upon that point. It has been suggested that, by reason of the policy having been drawn up on a printed form, the printed terms of which are applicable to a voyage and also to goods as well as to the ship, the policy is something less, or something more, than a time policy. But the practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe, and limit the risk intended to be insured against, without striking out the printed words which may be applicable to a large or different contract, is too well known, and has been too constantly recognized in courts of law to permit of any such conclusion."

This rule is recognized and assented to by both courts below. If there be any inconsistency between the written provision of the policy and the printed portions thereof, the written language must prevail. It becomes necessary, therefore, to determine what is the meaning of the written portion of the policy, and what was intended by the parties by the langauge "on account of whom it may concern." Both courts below concur in the statement that a policy so worded will cover the interest of the person for whom it was intended by the party taking out the insurance, even though the particular person intended was not then known. It was said in the district court that it was enough if the person taking out the insurance intended to protect the interest that afterwards passed to the person injured; that it was not essential that he should have had any specific individual in mind at the time when he took out the insurance. The opinion of the court of appeals concedes that a policy in the name of a special party, "on account of whom it may concern," will cover the interest of the person for whom it was intended by the party who ordered it, although the particular person intended was not known. But the court

of appeals was unable to discover anything in the case to support a finding that Hagan (the person taking out the insurance) intended to insure a subsequent vendee of the boat or of an interest therein, because of the retention in the policy of the printed provision that it should be entirely void, unless otherwise provided by agreement, if any change in the interest, title, or possession should be made. The retention of this printed provision, the court said, precluded the inference of any intent to make the policy applicable to any person claiming under or by virtue of such transfer.

We concur in the view that by virtue of the language contained in the policy, "on account of whom it may concern," it is not necessary that the person who takes out such a policy should have at that time any specific individual in mind. If he intended the policy should cover the interest of any person to whom he might sell the entire or any part of the interest insured, that would be enough. In Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219, it was said that a policy upon a cargo in the name of A, on account of whom it may concern, will inure to the interest of the party for whom it was intended by A, provided he at the time of effecting the insurance had the requisite authority from such party of the latter subsequently adopted it. The facts in that case differ materially from those presented by this record, but the meaning of the language "on account of whom it may concern" is stated in the opinion of the court, and authorities are therein cited which show that it is not necessary that at the time of effecting the insurance the person taking it out should intend it for the benefit of some then known and particular individual, but that it would cover the case of one having an insurable interest at the time of the happening of the loss, and who was intended to be protected at the time the party took out the insurance.

In I Phillips, Insurance, it is stated:

"Sec. 385. The rule, that an insurance 'for whom it may concern' will avail in behalf of the party for whom it is intended, does not mean that any specific individual must be intended * * * But he may intend it for whatever party shall prove to have an insurable interest in the specified subject, in which case it will be applicable to the interest of any person

subsequently ascertained to have such an insurable interest, who adopts the insurance.

"Sec. 388. One may become a party to the insurance effected in his behalf, in terms applicable to his interest, without any previous authority from him, by adopting it, either before or after a loss has taken place and is known to him, though the loss may have happened before the insurance was made."

In 2 Duer, Marine Insurance, p. 28, it is stated as follows:

"In England, the policy in its usual and almost invariable form contains a general clause, the terms of which are sufficiently comprehensive to embrace all persons who have an insurable interest in the property, and a lawful right to be insured. The insurance is expressed to be "in the name of A. B. (the person effecting the policy), as well in his own name as for and in the name and names (without specification) of all and every other person and persons to whom the same (the property insured) doth, may, or shall appertain, in part or in all." In the United States, as on the continent of Europe, the general clause is framed in various forms of expression, and the construction necessarily varies, as the terms used are more or less extensive in their application. In some cases the insurance is expressed to be "on account of the owners." In some, on "account of a person or persons, to be thereafter named;" but its most usual form is, "on account of whom it may concern." An insurance on account of the "owners," is probably limited to those who have a legal interest in the subject insured. But the words, "on account of whom it may concern," are co-extensive in their possible application with the general clause of the London policy."

And the learned author adds in a note the following:

"The Philadelphia policies retain the English form; and why it has been departed from in any of the cities of the Union, it is not easy to understand. The words are the most comprehensive and significant that could be chosen, since they apply not only to all persons, but the every species of interest. As the clause, however, 'for whom it may concern," has received the same construction, it is not now necessary to alter it."

The English form insures the person to whom the property insured "doth, may, or shall appertain," thus insuring the owner or one who has an interest in the property at the time when the loss occurs. And the author says that words "on account of whom it may concern" have the same significance as the language used in the English form.

We are constrained to differ from the conclusion arrived at by the circuit court of appeals in its statement that there was nothing in the case to support a finding that Hagan intended to insure a subsequent vendee of the boat, or of an interest therein, because of the retention in the policy of the provision that it should be entirely void, unless otherwise provided by agreement, if any change, etc., should be made. It seems to us that the very purpose of stating that the insurance was on account of whom it may concern was to do away with the printed provisions in regard to the sole ownership and to the change of interest. It was an agreement "otherwise provided," than in the printed portion of the policy. It provided for the happening of a contingency by which at the time of the loss the person taking out the insurance might not be the sole and unconditional owner of the thing insured because of a change in the interest or title happening by the act of such person between the time of taking out the insurance and the occurrence of the loss. This, we think, was the intention of the party taking the insurance, to be arrived at by reading the written language of the policy and by reference to the fact that he intended to insure the whole title, and not his mere interest therein from time to time. Otherwise we do not see what effect is given to the written portion of the instrument.

There is no doubt, and the district court so found, that Hagan intended by the policy to secure the insurance upon the entire title, and he therefore intended thereby to protect that title during the running of the policy, and when the clause is added in writing that it was issued on account of whom it may concern, it shows that he intended that such title should be protected in the hands of any person to whom he might transfer the same or any portion thereof. If otherwise, and the intention were only to protect his own interest, the policy, as

stated by the district judge, would naturally have been taken out in his own name, omitting the qualifying phrase, on account of whom it may concern. This phrase was put in for some purpose, and such purpose was, as it seems to us, to protect the whole title without making it necessary to notify the company and obtain its consent to any transfer of interest.

At the time when Hagan took out the policy he was the sole owner, and unless he intended the written words to apply to those to whom he might afterwards assign his interest or some portion thereof, the language would seem to fill no purpose.

If the policy were to become void in case of a transfer of all or any part of the interest of the person taking out the insurance unless the company were notified and provided by agreement indorsed on the policy for such change, we do not see that any alteration in its terms and meaning was accomplished by the insertion of the phrase in question. By the interpretation contended for by the company, it would have the same right, if the written provision were contained therein, to refuse to otherwise provide by agreement for the transfer of an interest, that it would have if such provision were stricken out, and the terms of the policy would in truth be unaltered by the insertion of that provision. We think this would be a totally different result from that contemplated by the parties. The words "on account of whom it may concern" do not refer to those interested in the policy simply at the time it is taken out. The terms refer to the future. It is not a question of the persons concerned when it is taken out, but of those who may be concerned when the loss may occur, and who were within the contemplation of him who took out the insurance at the time that he did so. It is on account of those who in the future, at the time of the happening of a loss, have the insurable interest and in regard to whom the policy will be applied. We think this is the common-sense interpretation of the language used, and that it is justified and required by the authorities, many of which are cited in Hooper v. Robinson, 98 U. S. 528, 25 L. ed. 219.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, ante, 213, 22 Sup. Ct. Rep. 133, has no bearing upon this

case. There the party insured proved by parol an alleged waiver, by the general agent of the company, of one of the conditions in the policy, which required that such waiver should only be given in writing and indorsed on the policy. It was contended that the company was estopped because of the conduct of the agent in the existing circumstances in issuing such policy and taking the premium, from setting up and claiming the benefit of the condition. This court held that the evidence was improperly received, and reversed the judgment.

In this case there is no question of receiving parol evidence to alter or change any condition in the policy. It is simply a question of construction as to the meaning of the language used in the policy, and as to the intention of the party taking it out, and whether the written portion (the intention of the party being as stated) is inconsistent with any printed portion thereof; and is so, whether it should prevail as against such printed portion. We think the written portion is inconsistent with the printed condition as to change of interest, and as to sole ownership and there being such inconsistency the written portion must be held to cover the assignee of a part interest in the tug, as intended at the time by the party taking out the insurance.

The judgment of the Circuit Court of Appeals must be reversed, and that of the District Court of the United States for the Eastern District of Pennsylvania affirmed, and it is so ordered.

MASCOTT v. GRANITE STATE FIRE INS. CO.

Supreme Court of Vermont. March, 1896. 68 Vt. 253.

Writing in Conflict With Printing. Construction. Ambiguous Terms.

Tyler, J. The defendant made the insurance contract with the plaintiff, and issued the policy to him, in consideration of the stipulations named therein, and of the sum of $36 paid by the plaintiff to the defendant as premium, and insured for one

year certain property of the plaintiff as follows: "Twelve hundred dollars,—$600 on his stock of undertakers' goods, including caskets, coffins, robes, trimmings, and funeral furniture; $400 on his stock of carriages and sleighs, and parts thereof, and silver-mounted hearse; $200 on his paints, oils, varnishes, leather, rubber and enameled cloth, broadcloth, carriage tops, backs, dashers, and cushions, paint mill, tools, letter patterns, and such other articles as are usually kept in a sign painter's and carriage painter's and trimmer's shop." The list is in typewriting, upon a separate piece of paper, which is attached to the face of the policy. Following the description is the clause: "To be attached to and form a part of the policy, * * *" and the paper is signed by the defendant's agents. The words "and such other articles as are usually kept," etc., are not without meaning. They are employed by the defendant in place of a full list of the property insured in that clause, and the articles usually kept must be read into the clause. If benzine was such an article, the clause should be read with that article added. In Whitmarsh v. Insurance Co., 16 Gray, 359, the property insured for the plaintiffs was "their stock in trade, consisting of the usual variety of a country store (except dry goods) and their store fixtures." It was held that the insurance covered the usual variety of a country store, and what such usual variety was could be ascertained by parol evidence. In Haley v. Insurance Co., 12 Gray, 545, a policy on "stock in trade, being mostly chamber furniture in sets, and other articles usually kept by furniture dealers," was held to cover paints and varnishes used to finish the furniture, if usually kept by furniture dealers, and that whether they were so kept might be ascertained by the jury. Steinbach v. Insurance Co., 54 N. Y. 90, and Carrigan v. Insurance Co., 53 Vt. 418, are directly in point. In Archer v. Insurance Co., 43 Mo. 434, the insurance was on a wagon maker's shop and materials, with a printed prohibition of benzine. The insured kept benzine in a paint shop in the same building. The same doctrine was held as in the Minnesota case hereafter noted, following the New York cases. The rule requires no further exposition that in a case like the present resort may be had to parol evidence to amplify the clause, and show what articles are usually kept, within its meaning.

The plaintiff testified that he habitually used benzine in his shop for various purposes, and offered to show that its use was necessary in his business, and that it "was usually kept in a sign painter's and carriage painter's and trimmer's shop." If he had been permitted to show this fact, benzine would have been covered by the policy, the same as if it had been one of the articles enumerated. The stipulations are printed in the body of the policy, and among them is the following: "This entire policy, unless otherwise provided, by agreement indorsed hereon or added hereto, shall be void if,"—enumerating the conditions. One of the conditions is as follows: "Or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises, benzine, benzole, dynamite," etc. If the plaintiff had shown what he proposed, the case presented would be that benzine was insured with the other articles described in the written part of the policy, while the keeping of benzine on the premises was prohibited in the printed stipulations, and there would be an apparent inconsistency between the two parts of the policy. But it would be only seeming. The true construction to be given the policy is that the prohibition of keeping benzine and other articles on the premises applies only when those articles are not insured. If the insurance did not include them, the keeping of them might reasonably be prohibited. By insuring benzine, it was "otherwise provided, by agreement indorsed upon the policy," that benzine might be kept on the premises, and thus the condition of the stipulation was complied with. In Insurance Co. v. De Graff, 12 Mich. 124, the policy provided that the same should be void if the premises were used for storing or keeping therein any articles in certain classes of hazards described, "except as herein specially provided, or hereafter agreed to by the insurers in writing upon the policy." It was held that, where a stock was insured under the general designation of "groceries," which included some of these hazardous articles, the insurance by this designation did specially provide for them in writing upon the policy. Whitmarsh v. Insurance Co. is to the same effect. See note to Insurance Co. v. Lenheim, 89 Pa. St. 497, in 33 Am. Rep. 778, where many cases are reviewed and this

rule is fully sustained. But where a repugnancy exists between the written and the printed parts of a policy, the written part must prevail. It was said by the court in Insurance Co. v. Taylor, 5 Minn. 492 (Gil. 393), that the written part of the policy, inserted by the parties, is more immediately expressive of their meaning and intention concerning the contract they are entering into than the printed portion. Benj. Prin. of Cont. 107. Other cases cited on plaintiff's brief sustain this point.

The general propositions contended for by the defendant's counsel, that "a policy of insurance, with its clauses, conditions, and stipulations, is the law of the legal relations between the parties," and "the contract of insurance is at an end the moment the warranty is broken, and cannot be revived without the consent of both parties, unless the insurer has, by some act or line of conduct, waived the breach," are not in conflict with the rules here laid down. There was error in excluding the evidence offered. Judgment reversed, and cause remanded.

McFARLAND v. RAILWAY OFFICIALS' & EMPLOYEE'S ACC. ASS'N OF INDIANAPOLIS.

Supreme Court of Wyoming. Nov. 1894. 5 Wyo. 126. 38 Pac. 347-677.

Time of Commencement of Action.

Conaway, J. This action was brought on a certificate of membership of the defendant association, in the nature of a policy of accident and life insurance, whereby defendant insured the life of William W. McFarland for 12 months, commencing June 10, 1891, against death by external, violent, and accidental means, in the sum of $2,000, payable to plaintiff, wife of the insured, should death result within 90 days from the time of the injury. On May 1, 1892, the insured received injuries such as he was insured against by virtue of the certificate or policy mentioned, from which injuries he died the

same day. Deceased was also insured in the same instrument against injuries not resulting in death, but this branch of the subject it is not necessary to consider. The certificate contains the following provision: "No suit in law or equity shall be maintained on this certificate, on any accidental injury or death, unless such suit be brought within one year from the date of the happening of the alleged injury; and failure to bring suit within one year shall be taken and deemed as conclusive evidence against the validity of such claim, and of forfeiture of all right under this certificate." Suit was not brought on this policy or certificate within one year from the date of the happening of the injury to and the death of the insured, but was brought a little more than 13 months after. Plaintiff admits that it was competent for the parties to limit the time for bringing suit by a provision inserted in the certificate by the association, and accepted by the insured; but plaintiff insists that under the conditions of the certificate the time of the limitation should not run "from the date of the happening of the alleged injury," but should run from the time the cause of action accrued, or, in other words, from the time when the company might be sued. This could not be done until the expiration of 90 days after the claimant had furnished verified affirmative proof in writing of the injury, which proof was required to be furnished within 7 months from the happening of such injury.

It appears that proofs of death were furnished by plaintiff on August 24, 1892,— less than four months after the injury to and death of the insured. It further appears that defendant finally denied its liability, and refused to pay plaintiff's claim, on September 1, 1892,—just four months after such death and injury. By written stipulation of the parties filed in the cause, it is, in effect, agreed that, if the court should be of the opinion that the suit is not barred by the limitation contained in the certificate, judgment shall go in favor of the plaintiff; otherwise, in favor of the defendant. Under these facts and conditions, the district court finds that three difficult and important questions arise, upon which it reserves a decision, and sends the cause to this court for its decision of the question, under the statute authorizing this course of procedure. The ques-

tions so reserved are these: "(1) Under the allegations contained in the pleadings herein, was this action commenced in time, or was the claim of the plaintiff barred at the commencement of this action by reason of the provisions of the policy sued upon, as set forth in the pleadings? (2) Under the pleadings herein, did the limitation named in the policy begin to run at the death of the insured, or at the expiration of ninety (90) days after the receipt by defendant of proofs of death, or at the time when the defendant refused to pay the plaintiff's claim? (3) Under the written stipulation of the parties herein, should judgment be rendered for the plaintiff, or for the defendant?"

The district courts asks, "Was this action commenced in time?" The answer to this question must determine what the judgment shall be. But, to answer this and the other questions reserved and submitted, we must consider and determine from what date the limitation runs. Three dates to be considered are indicated in the questions of the court and in the briefs and oral arguments of counsel: First, the date of the death of the insured, May 1, 1892; second, the date of the final refusal of defendant to pay the claim of plaintiff, September 1, 1892; and third, 90 days after proofs of death were furnished, the expiration of the 90 days occurring November 24, 1892. The question of the date from which the limitation runs is an important one, involving, as it does, leading and elementary principles in the construction of contracts, and being a question of first impression in the courts of this state. And it must be considered a difficult question, since eminent courts are in conflict in their views of contracts of insurance similar to the one under consideration. These conditions require a careful consideration of the question, and a careful scrutiny and weighing of the authorities on both sides.

The main contention of plaintiff seems to be that the limitation of the time for bringing suit to "one year from the date of the happening of the alleged injury" shall be held to mean one year from the date when the cause of action accrues. The doctrine upon which the contention is based is stated in Wood on Insurance (second edition), changing the language used in the first edition to these words: "Sec. 469. It is held in

some of the cases that when a policy stipulates that no action shall be brought, unless commenced within a certain time after loss or damage shall accrue, and there is a provision in the policy that the company will pay in thirty, sixty, ninety, or any other number of days after proofs of the loss have been served, the limitations does not attach until after the period which the company has in which to pay the loss has expired. The limitation does not apply until the right of action has accrued, and until the period has expired which the company has to pay the loss in, no right of action exists." Cases from New York, Michigan, and West Virginia are cited in a note to support this view. The note continues, "But a contrary doctrine is held in some of the states;" citing cases from New Hampshire, Connecticut, Massachusetts, Vermont and Illinois. The exhaustive researches of counsel have resulted in the collection of a large number of cases from nearly half of the states in the Union as bearing more or less directly upon the question under discussion. It is admitted by plaintiff that it is lawful for the parties to a contract of insurance to limit the time within which an action may be brought upon such contract by a provision inserted therein. So cases cited to establish this proposition will not be mentioned in this discussion. It is only necessary to consider cases which hold that provisions for occupying a portion of the time limited in the performance of conditions precedent to the right of action do or do not extend this time beyond the limit specified. It is admitted by the defendant that if the time allowed for, or necessarily occupied by the claimant, under contract of insurance, in performing such conditions precedent, should include all the time specified within which suit must be brought, or should not leave a reasonable time for that purpose, the right of action would not be lost by the lapse of the time specified. Neither if the bringing of the action was delayed beyond the time limited by the conduct of the insurer. So cases cited to these propositions will be eliminated from this discussion. The most of the cases bearing upon the question of extending the time limited for commencing suit by holding the limitation to run from a later date that that specified in the policy are cases of fire insurance which limit the time to a certain num-

ber of months after the loss or after the fire, and further require proofs of loss to be furnished, or other conditions precedent to the right of action to be performed, for which time is allowed, or which necessarily consume time. So far as the question has been before the federal courts, the decisions are conflicting. Judges Thayer, Bunn, Hawley, and Gilbert have held, in favor of the position of plaintiff, that the limitation runs only from the time the cause of action accrues, although the policy reads a certain number of months after the loss or after the fire. Judges Deady and McKenna, and the court of appeals of the District of Columbia, hold directly the reverse. See Steel v. Insurance Co., 2 C. C. A. 463, 51 Fed. 715; Vette v. Insurance Co., 30 Fed. 668; Friezen v. Insurance Co., Id. 352; McEhone v. Association, 22 Wash. Law Rep. 157. Coming to the states, we find five states and one territory holding, by their courts of last resort, that a limitation of a certain time for beginning action after the loss or after the fire shall not run from the date of the loss or of the fire, but from the time the cause of action accrues. We find a considerably larger number where the decisions are directly to the contrary effect, and a number where they are somewhat equivocal, and claimed by both parties, and some make a distinction between the meaning of the phrases "after the loss" and "after the fire." So, if we were to decide this case according to the number of the authorities, we should be compelled to decide it in favor of the defendant. But this is not a satisfactory way of determining a question of the construction of the language either of a contract or of a statute. An examination of the decisions, with the reasons assigned for them, is preferable.

The case of Barber v. Insurance Co. 16 W. Va. 658, was an action on a policy of fire insurance, which made the loss payable 60 days "after due notice and proof of the same," but specifying no time within which such notice and proof should be made, and limiting the time for bringing action to "six months next after the loss should occur." The court calls the time which must elapse before suit can be brought an indefinite time, because the claimant was not required to furnish his proofs of loss within a specified time, and holds that

in such cases, the six months limitation runs from the time when the cause of action accrues and not before, and expires in this instance six months and sixty days after proofs of loss were furnished, and finds that this was "the intent of the parties." The later case of Murdock v. Insurance Co., 33 W. Va. 407, 10 S. E. 777, was an action on a policy of insurance which limited the time for bringing action to six months from the date of the loss, and requiring proofs of the loss within 30 days thereafter, and allowing the insured 60 days after proof of loss in which to make payment. The court quotes from Barber v. Insurance Co. supra, that the "intent of the parties to the contract was that the six-months limitation should commence to run when the cause of action accrued, and not before." And the court concludes: "So that case is authority for the position (1) that the limitation does not begin until the cause of action accrues; and (2) that it does not begin from the actual loss,—thus departing from the letter of the policy." In Iowa the doctrine is firmly established that under a policy of insurance limiting the time for bringing action upon it, and requiring the performance of conditions precedent which must occupy a portion of that time, the limitation does not commence to run until the right of action accrues. See Matt v. Association, 81 Iowa, 135, 46 N. W. 857; McConnell v. Association, 79 Iowa, 757, 43 N. W. 188; Ellis v. Insurance Co., 64 Iowa, 507, 20 N. W. 782; Miller v. Insurance Co., 70 Iowa, 704, 29 N. W. 411; Eggleston v. Insurance Co., 65 Iowa, 308, 21 N. W. 652; Quinn v. Insurance Co., 71 Iowa, 615, 33 N. W. 130. Two reasons for this line of decisions are given in the different cases in Iowa: One reason is the assumption, made in the West Virginia cases, that such was the intent of the parties, and a statement of it is found in Ellis v. Insurance Co., supra,—a case of fire insurance,—in these words: "Now, it is apparent that, if the literal construction of the provision in question contended for by defendant obtains, it might frequently happen that the right of action would be barred by it before such right had accrued to the assured under the other provision. It is very clear that the parties never intended that such a result should be accomplished." The time limited in the case was "six

months next after the loss shall occur." The other reason, as held in Iowa, is that there is a rule of construction of limitations, both by statute and by contract, that the limitation runs only from the time when the right of action accrues. It is stated in McConnell v. Association, supra,—a case of life insurance,—in these words: "It is a familiar and just rule, recognized by the courts, that a bar created by statute or by contract to an action for a breach of its conditions, by reason of the lapse of time, will not commence to run until the right of action accrues; that is, the plaintiff must have the full time given by the statute or contract after his right of action arises, in which to commence his suit." The limitation in this case was six months after the death of the assured. As to this case, it is sufficient to say that no case has been cited by counsel, and none has occurred to us, which holds that a period of limitation fixed by statute has ever been changed by a court by construction. And by all the authorities the rule of construction is the same for contracts as for statutes,— that the true meaning and intent of the language is to be sought. The authority of the supreme court of Nebraska is in favor of plaintiff. Insurance Co. v. Fairbank, 49 N. W. 711, 32 Neb. 750, was an action on a policy of fire insurance limiting the time for bringing action to "six months after the loss or damage shall occur," and requiring proofs to be made in 30 days after such loss or damage, and payment to be made within 90 days after proofs furnished. The court says, "The fair and reasonable interpretation of the provisions of the policy, when construed together, is that the limitation did not begin to run from the date of the loss, but from the time the suit could have been brought." This case is followed by the same court in Insurance Co. v. Buckstaff (Neb.) 56 N. W. 697. The case of Hong Sling v. Insurance Co. (Utah) 30 Pac. 307, is in favor of the plaintiff's theory of construction. It is an action on a policy of fire insurance limiting the time for bringing action for loss or damage by fire to "twelve months from the date of said fire," and requiring proofs of loss within 30 days after, and payment within 60 days after, proof, and requiring arbitration before suit. The court holds that the action may be brought within 12 months after the cause of action accrues,

and that this is what the parties intended and understood by the words, "within twelve months from the date of said fire," because all that time might be necessarily consumed by plaintiff in performing the conditions precedent to the right of action. The court of appeals of New York holds that the word "loss," in the limitation clause of a policy of fire insurance, has reference to the time when the loss becomes payable by the insurer, and when the right of action accrues. Hay v. Insurance Co., 77 N. Y. 235. The supreme court of Arkansas also takes this view. Insurance Co. v. Jones, 54 Ark. 376, 15 S. W. 1034. These are all the states, so far as we are at present advised, that hold unequivocally in favor of plaintiff. There are a few others whose courts have used language claimed by plaintiff to favor this view, but which is at least doubtful, which will be considered presently.

As already stated, the great preponderance in numbers of decisions is against this view. But the courts taking this view are courts of eminence, and they are entitled to respect; and, if their position is sustained by convincing reasons, mere numbers should not be allowed to prevail against them. Their number is sufficient to make a very respectable array. But the weight of these decisions as authority is greatly reduced by the fact that they do not agree as to the basis or reason upon which they rest. All of the courts which we have mentioned cite New York cases as sustaining them; so it is somewhat important to determine just how far the New York cases do sustain them. Hay v. Insurance Co., supra, was a suit upon a policy of fire insurance requiring proofs of loss to be furnished as soon as possible after the fire, providing that the loss should be paid within 60 days after proof, and limiting the time for commencing action to 12 months. The court (one judge dissenting) says: "The loss should be deemed to occur when the company pays it, or may be lawfully called upon to pay it. The loss then, and not until then, practically occurs to it. These words may in some clauses refer to the destruction of the property, but it does not necessarily follow that they do in this." It is to be remarked that, of the states we have mentioned as citing New York cases as authority for their decisions, none but Arkansas adopts this reason for a

decision. The West Virginia court makes a similar decision under a similar policy, but characterizes its decision expressly as "departing from the letter of the policy." If the word "loss", in the limitation clause, meant the loss to the company by its incurring a liability to suit so many days after proofs of loss, then the decisions followed strictly the letter of the contract. The Iowa supreme court says that, under a literal construction of such provisions, the right of action might be barred before it accrued. This, of course, is inconsistent with the idea that the loss is the accruing of the right of action, as the New York and Arkansas courts hold. The Nebraska court makes the distinction expressly between "the date of the loss" and "the time the suit could have been brought," but holds that the latter is meant when the former is expressed. The case of Hong Sling v. Insurance Co. (Utah) 30 Pac. 307, was an action on a policy limiting the time for bringing suit to 12 months from the date of the fire, and it cites a number of New York cases as holding to this latitudinarian construction, but the New York courts never held so. When a policy of fire insurance says "next after the fire," the New York courts hold that it means next after the fire. The New York cases which favor plaintiff's position turn upon the meaning of the word "loss". See King v. Insurance Co., 47 Hun, 1. But it must be allowed that when a policy requires proof of loss by fire to be made immediately or within a certain time after the fire which caused the loss, and payment of such loss to be made within a certain time after the submission of the proofs of the same, and that any suit is barred unless brought within a certain longer time after the loss occurs or accrues, the New York and Arkansas courts hold that the word "loss" in each place where it occurs, except the last, means the loss to the insured by fire, which he was insured against, but in the last place it means the loss to the insured by the accruing of a right of action. So far as we are at present advised, no courts, except those of New York and Arkansas, have taken this view. A large proportion of the courts of the states have held differently. Some, as the courts of West Virginia and Iowa, have confessedly departed from the letter of a literal construction of the contract in order to make the insurers liable.

Cases in favor of the contention of defendant are numerous. Johnson v. Insurance Co., 91 Ill. 92, was an action on a policy of fire insurance which provided that the loss or damage should be estimated according to the actual cash value of the property at the time of the loss, and paid 60 days after proofs of the same made by the assured, unless the property were replaced, or the company had given notice of its intention to repair or rebuild the damaged premises, and that no suit should be brought until after award obtained in a manner specified, nor unless "commenced within twelve months next after the loss shall occur." Few policies are more burdened with conditions to be performed, and requiring time for their performance, before a right of action accrues than this. The court, after stating the general and universally accepted principle controlling the construction of laws and contracts, that the intention, as expressed, must govern, proceeds: "When did the loss occur? Manifestly, at the time the fire destroyed the property. In what consisted the loss? Obviously, in the destruction of the building by fire. We are wholly unable to perceive that language could have been used that could have rendered the meaning plainer." And the action, not having been commenced within 12 months next after the destruction of the building by fire, was held to be barred by the limitation of the policy requiring it to be "commenced within twelve months next after the loss shall occur." Bradley v. Insurance Co., 28 Mo. App. 7, was an action upon a policy of fire insurance which limited the time for bringing action upon it to "six months next after the loss shall occur." The policy also provided that the amount of the loss or damage was to "be estimated according to the actual cash value at the time of the loss, and to be paid 60 days after the proofs of the same shall have been made by the assured," etc. In the opinion appears the following: "When did this loss occur? Certainly, on the day, at the instant, when the property was destroyed by the fire. The term employed in the contract is apt and unambiguous." And the court held that the six-months limitation ran from the date of the fire. Chambers v. Insurance Co. 51 Conn. 17, was an action on a policy making losses payable 60 days after proofs furnished, and limiting

the time for bringing action to "twelve months next after any loss or damage shall occur." The court says: "This limitation is lawful and reasonable. In words of common use and plain meaning, an event is referred to as a starting point; that is, the destruction of or injury to the plaintiff's property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law; and there is nothing either in the structure or the subject-matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant, and the institution of the suit. The contract keeps the day upon which a fire occurs entirely distinct from the day upon which the right to sue for indemnity accrues. Each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended, and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement." And "twelve months next after any loss or damage shall occur" was held to mean 12 months next after the destruction of or injury to the insured property by fire. Insurance Co. v. Wells, 83 Va. 736, 3 S. E. 349, was an action upon a policy making any loss or damage insured against payable 60 days after receipt of proofs of loss, and limiting the time for bringing action to "six months next succeeding the day upon which the loss or damage is alleged to have taken place." The court says: "It is undeniable that a policy must be construed with reference to all its provisions, like any other contract. And it may not be gainsaid that the condition of a policy should be construed, if possible, so as not to defeat the claim of the assured, which, in effecting the insurance, it was his purpose to secure. But there is no sounder rule of construction than that, 'when the terms and stipulations in a contract are plain and clear, we are bound to adhere to the terms, as the only authentic expression of the intention of the parties.' None would be rash enough to claim that there is obscurity or ambiguity in the language in which is expressed the prohibition to institute an action upon this policy after six months next

succeeding the time when the loss is alleged to have taken place. The position is that the sixty days during which the company is entitled to delay the payment of the loss incurred by the fire should be eliminated from the six months. Had such been the intention of the parties, how easy it would have been so to have expressed that intention. But there is nothing in the policy, which is clear and unambiguous in its terms, to indicate any such intention." And the court held that the limitation ran from the date of the fire. The case of Travelers' Ins. Co. v. California Ins. Co. (N. D.) 45 N. W. 703, required the judicial construction of a policy of fire insurance, which limited the time for bringing action upon it to "twelve months next after the loss shall have occurred." The policy contained the familiar provision requiring proofs of loss before bringing suit. The court says: "It is undoubtedly true that a majority of the adjudications so interpret these limitations as to allow the full time to sue after the right of action has accrued, although more than the limited time has elapsed since the loss has occurred. We cannot assent to the doctrine of these cases. They rest upon the alleged necessity of harmonizing conflicting provisions." In language convincing, and which seems truly unanswerable, the court shows that such provisions are not conflicting, unless they are such as to deprive the insured of a reasonable time in which to sue. But the court is in error in saying that the majority of the adjudications are contrary to its views. In Blanks v. Insurance Co., 36 La. Ann. 599, negotiations were protracted until the limitation was within two months of its close. This was held to be sufficient time for bringing suit. Fullam v. Insurance Co., 7 Gray, 61, was an action upon a policy of fire insurance allowing the claimant one month in which to furnish proofs of loss, and giving the insurer three months after proofs furnished in which to pay the loss, and limiting the time for bringing action to "six months next after any loss or damage shall occur." The action, not having been commenced until after the expiration of six months from the date of the fire, was held to be barred, and judgment was ordered for the defendant. It is somewhat remarkable that the cases which hold to a contrary doctrine—all recent, and evi-

dently tending to a new departure in the construction of contracts—have, it seems, all ignored this earlier case, decided by the supreme judicial court of Massachusetts, without dissent, when the Hon. Lemuel Shaw was chief justice of that tribunal.

The cases which hold that the phrase "next after the fire," in the limitation clause of a policy of fire insurance, means "next after the cause of action accrues," are few. They are Hong Sling v. Insurance Co., supra; Steel v. Insurance Co., supra; Vette v. Insurance Co., supra; and Friezen v. Insurance Co., supra. These decisions reach results more clearly in opposition, if such a thing be possible, to the meaning and intent of the parties, as expressed in the language used, than do the cases which hold the words "after the loss occurs" to mean "after the cause of action accrues." They have not in their favor even the argument of the New York court, that the loss meant is the loss to the insurer by the accruing of a cause of action against him, and not the loss by fire of the property insured. And this argument, such as it is, is thoroughly refuted, if, indeed, it should not be said, utterly overwhelmed, by the foregoing citations. It is incredible that, when the parties say 6 or 12 months next after the fire, they mean 6 or 12 months after some other date or event. To this effect are the following additional cases: Insurance Co. v. Meesman, 2 Wash. St. 459, 27 Pac. 77; McElroy v. Insurance Co. (Kan.) 29 Pac. 478; Insurance Co. v. Stoffels, Id. 479; Insurance Co. v. Little, 20 Ill. App. 431; Owen v. Insurance Co. (Ky.) 10 S. W. 119; Hocking v. Insurance Co., 130 Pa. St. 170, 18 Atl. 614.

California cases are cited, but they are not in favor of plaintiff. Garido v. Insurance Co. (Cal.) 8 Pac. 512, was an action on a policy which limited the time for bringing action to "twelve months next after the loss." The property insured was destroyed by fire on February 15, 1880. The action was commenced November 1, 1881. Negotiations for settlement were continued until January 21, 1881. The court says, "This was ample time to commence suit." And the judgment of the lower court in favor of the plaintiff was reversed because the action was not begun within the time limited. It

will be observed that the "ample time" was 25 days. This case has never been overruled. The later case of Case v. Insurance Co., 83 Cal. 477, 23 Pac. 534, is distinguished from this case by the court; the time having been occupied by the claimant in performing the conditions of the policy, presumably with reasonable diligence, until 3 months after the 12-months limitation had expired.

Lentz v. Insurance Co., 96 Mich. 445, 55 N. W. 993, was an action on a policy of fire insurance making any loss payable 60 days after proof of the same, and limiting the time for bringing suit to "six months next after the loss shall occur." An action brought 6 months and 12 days after the fire which caused the loss, the court held to be barred; following Law v. Association, 94 Mich. 266, 53 N. W. 1104, and distinguishing Voorheis v. Society, 91 Mich. 469, 51 N. W. 1109.

Chandler v. Insurance Co., 21 Minn. 85, was an action on a policy of fire insurance, loss insured against to be paid within 60 days after proof, and containing a limitation clause in the following words: "It is expressly covenanted by the parties hereto that no suit or action against the company, for the recovery of any claim under or by virtue of this policy shall be sustained in any court of law or chancery, unless commenced within the term of one year next after any claim shall occur; and, in case such suit or action shall be commenced against the company after the end of one year next after such loss or damage shall have occurred, the lapse of time shall be taken and admitted as conclusive evidence against the validity of the claim thereby attempted to be enforced, any statute of limitations to the contrary notwithstanding." The court finds in this language two inconsistent limitations, and, of course, enforces the one most unfavorable to the company, whose language it is. The time "when any claim shall occur" is held to be not earlier than when proofs are furnished, or when the company becomes liable to suit, 60 days thereafter. But the time when the "loss or damage shall have occurred" is considered to be the date of the loss of the insured property by fire. So this is another case in opposition to the doctrine of the New York supreme court, that the word "loss," in the limitation clause of such a policy, does not mean the loss

of the insured, by the destruction of his property, but does mean the loss to the insurer, by having to pay to the insured the whole or some portion of his loss. The court says of the limitation clause quoted: "The first branch of this condition clearly sustains the plaintiff's contention. The expression 'claim shall occur' obviously means shall 'arise' or 'accrue.' No claim occurs or arises to the assured upon the mere happening of the loss. The giving of notice and the furnishing of satisfactory proofs are conditions precedent to be performed by the assured before they are entitled to claim the stipulated indemnity, and not until 60 days after the performance of the last of these conditions can their claim be enforced by suit. It is unnecessary to determine in this case whether, by the first branch of the condition, the time of limitation begins to run from the furnishing of proofs, or sixty days thereafter. It would seem however, that the claim exists when notice has been given and proofs furnished, although it is not payable until the expiration of sixty days." With all due respect, we must suggest that if the assured had no claim he had no occasion to give any notice or proof. To do so would put him in the attitude of saying, "I claim nothing, and here is my notice and proof of the fact." To make a claim is one thing; to establish it by proof is quite another. The claim may be a thousand dollars; the recovery, a hundred. The claim may never be realized at all, as a crop of wheat standing in the field will be lost unless harvested. He would be a rash man who would decline to file a claim against the estate of a decedent until after the time limited for filing claims because the debt of the decedent to him would not sooner become due and ready to bring suit upon. And it would be inaccurate, at least, for a court to say that the wheat lost for want of harvesting was not wheat at all, because lost and never measured. The court proceeds: "The second branch of the condition as clearly provides that, unless suit is brought within one year after the occurrence of the loss, the lapse of time shall be conclusive evidence against the validity of the claim. These two limitations cannot stand together." We have quoted at some length from this case, as it differs from all of the others, in having the words "next after any claim

shall occur" to construe, whereas others had the words "next after the loss," or "next after the fire." Were it necessary to the decision of the case at bar, we should hesitate long before concurring in the view that the claim does not arise from the loss of the property insured, and at the time of the loss. It would seem that, if the assured has no just and valid claim, then he never can have, and that the notice and proof required is to fix the amount he should receive in satisfaction of such claim, and to give the insurance company an opportunity to ascertain such amount, and to pay it without suit. All this work is to be done upon a claim arising from the destruction by fire of the property insured, though the claim is not yet due, and the amount not settled. All authorities agree that the object to be attained in construing a contract is to ascertain the meaning and intent of the parties, as expressed in the language used; and we should again hesitate long before holding that the parties intended to introduce two inconsistent limitations in the single sentence constituting the limitation clause of this contract of insurance. Such an improbable conclusion should not be tolerated, if it can be avoided by any reasonable construction of the language employed. And it seems to be clear enough that by the two expressions, "in one year next after any claim shall occur," and "one year next after such loss or damage shall have occurred," the parties intended to indicate one and the same identical period of time. The weight of authority is not, as some courts have said, in favor of the proposition that the date from which the limitation of the time for bringing action on a contract of insurance is to run may be changed by construction. Neither is the weight of authority in favor of the proposition that such a period next after the loss or next after the fire shall mean next after the cause of action accrues. The authorities to sustain either of these propositions are comparatively few in number, and conflicting and unsatisfactory in the reasons assigned. In no kind of contracts, except contracts of insurance, have such constructions been given to similar language, or such departures from the meaning of words been tolerated. No such construction of statutes has been made. The decision to the contrary effect are numerous, and they are con-

sistent and convincing in their reasoning, because they merely adhere to the obvious meaning of plain and unambiguous language.

But could we hold that "next after the fire," or "next after the loss," means next after a cause of action accrues, it would not be decisive of the case at bar. The cases of fire insurance have been discussed merely as showing how far courts have gone, or refused to go, in construing the limitation clauses in policies of fire insurance. But such cases are only remotely related to the case at bar. The insurance in this case was against physical injury resulting in disability or death. The limitation clause requires that any action shall be brought "within one year from the date of the happening of the alleged injury." Even the New York courts do not hold that the injury meant is an injury to the company by the accruing of the cause of action. The case of Cooper v. Association, 132 N. Y. 334, 30 N. E. 833, was an action on a certificate containing a limitation similar to that in the case at bar. The court says: "The accident received by Cooper did not injure the plaintiff, or give her a right of action, until death ensued. So far as he is concerned, the infliction of the wound is but the beginning, and the death is the completion, of the injury. Her suit must be commenced within one year from the date of the alleged accidental injury; in other words, within one year from the time of the injury to her, which was the death of her husband, as the result of the accident." It is admitted that it is competent for the parties to a contract of insurance to reduce the time within which an action may be brought on such contract. It seems immaterial whether such reduction is made by cutting off some years of the end of the term, or some months from the beginning, or both; neither whether such reduction of time is made directly, in express words, or by appropriating a portion of the time to other purposes, provided a reasonable time remains for bringing the suit. In the case at bar, plaintiff had more than five months in which to commence suit within the time limited after the clause of action had matured, and just eight months after the defendant company had denied its liability. To the questions of the trial court, we answer:

the ordinary case of a debtor giving to a creditor security for a debt which is a lien on property. It is the case of an insurance company executing a bond to the state in compliance with the statute of the state designed to protect its policy holders in the state by compelling the company to carry out its contracts made in this state. There was, we think, no intention of the Legislature to enlarge or extend the liability of the company.

Now the right of action on the bond may not be affected by the limitations in the policy, but the question of whether plaintiff is entitled to recover does depend not only on the bond but also on the forms of the policy. Although the contracted limitation in the policy may not, strictly speaking, operate to bar the action on the bond, yet no recovery can be had unless something is due plaintiff on the policy. For, while this is an action on the bond, the right to recover, as before stated, depends on the policy also. In order to recover, the plaintiff must show not only the execution of the bond but that there is something due him on the policy which the company has refused to pay. But the condition in the policy, that the company shall not be liable unless suit is brought within one year, has a very different effect from that of the statute of limitations on a debt. The statute of limitations affects the remedy only. The debt still exists, and, if it be secured by a mortgage which is not barred, the mortgage may be foreclosed and the debt collected, though no action could be brought on the debt itself. But by this clause in the policy the company owes nothing if suit be not brought within one year. After that time not only the remedy but the debt itself is gone and there is no right to recover for that was the condition upon which the promise to pay the amount of the policy was made. Williams v. Insurance Co., 20 Vt. 222; Cray v. Hartford Ins. Co., 1 Blatchf. 280, Fed. Cas. No. 3,375; 2 May on Insurance, § 482; 4 Cooley, Briefs on Ins. 3969.

In this case, the company attempted in good faith to carry out its policy. It paid the amount of the policy to the mother of the plaintiff, who had been appointed his guardian, and she testified in this case that she spent the money for his benefit, but as she had executed no bond it is doubtful if this

payment to her would have protected the company had this action been commenced in time. But it was not, and, by the terms of the policy, the company is no longer liable. So far as the policy is concerned it must now be conclusively presumed that the company owes the plaintiff nothing on its policy. As before stated, we do not think it was the intention of this statute to enlarge the liability of the company and to permit a recovery on the bond when nothing was due on the policy. We are therefore of the opinion that the circuit court correctly held that under the circumstances of this case there was no liability on the bond.

Judgment affirmed.

Note. Held that an action by mortgagee could be maintained against insurer, although the mortgage was not yet due, where the policy provided that no suit could be brought on the policy unless it was commenced within six months after loss. Planter's Mut. Ins. Co. v. Southern Savings Fund & Loan Co., 68 Ark. 8, 56 S. W. 443. Accord. Kettering v. Northwestern Masonic Aid Ass'n., 96 Fed. 177; Chichester v. New Hamp. Fire Ins. Co., 74 Conn., 510, 51 Atl. 545; Mead v. Phoenix Ins. Co., 68 Kan. 432, 64 L. R. A. 79, 75 Pa. 475; Peck v. German Fire Ins. Co., 102 Mich. 52, 60 N. W. 453; Ward v. Penn. Fire Ins. Co., 82 Miss. 124, 33 So. 841.

Note. Where the defendant wrongfully failed to deliver the policy, and a suit by one who believed himself to be the beneficiary was commenced within the time for bringing action under the terms of the policy, and the error was not discovered until after the time for bringing action it was held that the plaintiff was not barred by the limitation of the policy. Phillips v. Union Cent. Life Ins. Co., 101 Fed. 33; Reversed. 102 Fed. 19, 41 C. C. A. 263.

GHIO et al. v. WESTERN ASSUR. CO.

Supreme Court of Mississippi. November 5, 1888. 65 Miss. 520. 5 Southern 102.

Time in Which to Bring Action.

Appeal from chancery court, Hinds county; E. G. Peyton, Chancellor.

One Rivara, a merchant, had his stock of goods insured. The goods were burned, but the companies refused to pay. Rivara sued on all the policies held by him on his stock of goods except one, which was a renewal policy of the appellee. Rivara finally obtained judgment against the several insurance companies, whereupon the creditors of Rivara garnished the several insurance companies. The companies, being in doubt as to whom they should pay the money, after they had been garnished filed a bill of interpleader, offering to pay the money into court, and be discharged. Afterwards the creditors appeared, and asked the court that the money might be paid to them, and to have decree against the appellee company. There is a stipulation in the policy that no suit against the insurer for the recovery of any claim on a policy shall be sustained unless commenced within 12 months next after loss shall have occurred, and that the lapse of that time is conclusive against the validity of any claim asserted in an action subsequently commenced. There was a decree in favor of the assurance company, from which the complainants, creditors of Rivara, appealed.

Arnold, C. J. It is provided by the terms of the policy in question that no suit or action against the insurer for the recovery of any claim on the policy shall be sustained unless commenced within 12 months next after loss shall have occurred, and that the lapse of this period shall be conclusive evidence against the validity of any claim asserted in any action subsequently commenced for its enforcement. It is not shown that anything was said or done by the insurer to waive or prevent the operation of this condition of the policy, and it is admitted that no suit or action was commenced on

the claim until after the expiration of 12 months from the loss. The condition of the policy which has been referred to was valid, and upon the facts of record it was a bar to appellants' action. Wood, Ins. § 434; Riddlesbarger v. Insurance Co., 7 Wall. 386; Express Co. v. Hunnicutt, 54 Miss. 566. Affirmed.

NEW v. GERMAN INS. CO. of FREEPORT.

Appellate Court of Indiana. May 27, 1892. 31 N. E. 475. 5 Ind. App. 82.

Assignment of Policy.

Crumpacker, J. This action was brought by New against the insurance company upon a policy of fire insurance issued by the defendant to one Pierson, covering certain buildings in the state of Missouri. The policy contained the following provision respecting the assignment thereof, and the change of title to the property insured: "If the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof, whatever, or if foreclosure proceedings shall be commenced, or if the interest of the insured in said property, or any part thereof, now is or shall become any other than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing hereon, * * * or if the policy shall be assigned without written consent hereon, then, and in every such case, this policy shall be absolutely void." It is alleged in the complaint that plaintiff became the owner of the property after the execution of the policy, by purchase, and the title was transferred to him by said Pierson by deed; that said Pierson transferred the policy to plaintiff by an assignment in due form indorsed thereon, and plaintiff then sent it to an agent of the defendant at Hopkins, Mo., to procure the defendant's consent to such assignment, but such agent returned the policy with notice that he had no authority to give the necessary con-

sent, and suggested that plaintiff send it to the defendant's general agents, then residents of Maryville, Mo., who would, without any trouble, consent to said transfer in writing; that thereupon the plaintiff caused said policy to be forwarded to the said agents, who issued the said policy or caused the same to be issued, and who received the same by due course of mail; that they retained it some considerable time, and then returned it to the plaintiff by mail without any word of explanation, without any disapproval thereof, without any expression or word in regard to the same, and without returning or offering to return to him or the said Pierson any part of the unearned premium received on "said policy;" that plaintiff, on receiving said policy from said agents, supposed, and in good faith believed, that the necessary written consent had been endorsed thereon, and, so believing, omitted to examine the same, but laid it away in his safe until after the loss occurred,—something over a year thereafter; that he was led to believe that consent had been endorsed upon the policy by the representations of the defendant's agent at Hopkins, Mo., that the general agents would undoubtedly do so. It was also alleged that proof of loss had been made, and all conditions complied with, on the part of plaintiff. A demurrer was sustained to the complaint, and the plaintiff declined to amend, whereupon judgment was rendered against him.

The question for decision arises upon the ruling of the court upon the demurrer. Appellant's counsel insist that the assignment of the policy without the company's consent did not ipso facto operate a forfeiture, but having received notice of the assignment, some act or declaration upon the part of the company was necessary to produce that result; and, having remained silent, the breach of condition was waived. It is argued that the word "void" should be construed as "voidable." In many instances after an insurance company has notice of the breach of a condition which, according to the terms of the policy, would result in a forfeiture, it must in some affirmative manner manifest its avoidance of the policy, or the condition will be taken as waived. Association v. Beck, 77 Ind. 206; Havens v. Insurance Co., 111 Ind. 90, 12 N. E. Rep. 137; Insurance Co. v. Marple, 1 Ind. App.

411, 27 N. E. Rep. 633. A void contract is incapable of being inspired with legal vitality except by some act equivalent in effect to a new execution. Hence it follows that the breach of any condition that can be waived renders the contract voidable only. But a different principle applies to the question involved in this appeal. Insurance policies are contracts of indemnity, and are essentially personal in their nature. They relate to the insured, rather than the subject-matter of insurance, and at common law were nonassignable. There is no statutory provision changing the common-law rule, but after a loss has occurred the policy becomes a chose in action, and is assignable as other choses in action are. Courts know, as a matter of general knowledge, that the character of the insured is taken into account, as affecting the moral hazard of a risk; and this is an additional reason why a change of indemnitee should not occur without consent of the indemnitor. An insured must have an interest in the subject of insurance, or the policy will be held a wager contract, and void as against public policy. Having obtained valid insurance, if the interest of the policy holder ceases in the property covered, the policy at once becomes inoperative. There is, then, no possibility of a loss; consequently, no basis for indemnity. The contract being one of indemnity, and personal to the insured, it follows that any assignment by him, with a transfer of the title to the property, transfers no right in the insurance to the assignee, without the consent of the insurer. Such consent is equivalent to the creation of a new contract between the assignee and the insurer, according to the terms of the policy assigned. It is not strictly an assignment, but the making of a new contract. Insurance Co. v. Munns, 120 Ind. 30, 22 N. E. Rep. 78. This being the case, there never was any contract between the appellant and appellee, and consequently no conditions that could be waived. After the transfer of title, Pierson had no insurance, because he had nothing to insure. Hence, no right passed by the assignment of the policy. Appellant had no right to rely upon the suggestion of the first agent to whom he sent the policy that the general agents would indorse the company's consent to the transfer. Conditions may be waived by silence,

under some circumstances, but it is rare that entirely new indemnity contracts may be created in that manner.

Judgment affirmed.

Accord. Morrill v. Manhatten Life Ins. Co., 183 Ill. 260, 55 N. E. 656; Miles Lamp Chimney Co. v. Erie Fire Ins. Co., 164 Ind. 181, 73 N. E. 107; Hall v. Continental Ins. Co., 27 Ky. Law Rep. 99, 84 S. W. 519; Lyford v. Conn. Fire Ins. Co., 99 Me. 273, 58 Atl. 916.

Note. Knowledge by the company before transfer, and consent to the transfer of the property insured, held sufficient consent. Hayes v. Saratoga & W. Fire Ins. Co., 179 N. Y. 535, 71 N. E. 1131.

Note. Where the policy contained a stipulation making it void if it was assigned without the consent of the insured, and also contained the usual "payable to mortgage as his interest may appear clause," it was held, that the stipulation, as to assignment, did not apply to an assignment of the interest of the mortgagee. 178 Mass. 535, 52 L. R. A. 788, 60 N. E. 1.

PALMER et al. v. HARTFORD FIRE INS. CO.

Supreme Court of Errors of Connecticut. 1887. 54 Conn. 488.

Reformation of Contracts.

Pardee, J. The complaint in this case is in effect as follows: Prior to May 15, 1884, the defendant had issued to the plaintiffs a policy of insurance against loss by fire upon merchandise. On that day it expired. On that day the defendant proposed to them to renew the insurance upon the terms and conditions of the expiring policy. The plaintiffs accepted the proposition. The defendant wrote a policy, delivered it to, and received the premium from, the plaintiffs. They, relying upon the fidelity of the defendant to its promise, and supposing the last written policy to contain the same stipulations and conditions as were in the first, omitted to read it. The merchandise was damaged by fire on August 17, 1884. Subsequently the plaintiffs for the first time discovered that

the last policy contained this condition, which was not in the first: "Co-Insurance Clause. If the value of the property at the time of any fire shall be greater than the amount of the insurance thereon, the insurer shall be considered as co-insurer for such excess, and all losses shall be adjusted accordingly." In this respect the last policy materially differs from the first. The plaintiffs would not have accepted the policy and paid the premium if they had known that it contained this clause; and, if the defendant had notified them of its refusal to perform its agreement, they could and would have obtained elsewhere, at the same price, the desired insurance upon the stipulated terms. The defendant refuses either to correct the policy or perform the agreement. The plaintiffs ask that the policy may be reformed so as to express the agreement, and that the defendant be compelled to perform the agreement, and pay the indemnity promised by it. The defendant answers by demurrer, assigning therefor the following reasons: "That upon the facts stated the plaintiffs are not entitled to the relief sought; that the complaint does not aver that there was a mutual mistake between the parties as to the terms of the policy, or as to the agreement for one; and that the plaintiffs were guilty of gross laches in not reading the policy, and in not notifying the defendant of their claim, so that it might have exercised its right of rescission before loss.

The superior court held the complaint to be insufficient. The plaintiffs appeal, assigning the following reasons: "(1) The court erred and mistook the law in rendering judgment in favor of the defendant to recover costs; (2) in not holding that the plaintiffs were entitled to recover at least the amount of loss covered by the policy, as delivered to the plaintiffs by the defendant; (3) in holding that upon the facts stated in the complaint the plaintiffs were not entitled to the relief sought; (4) in holding that the plaintiffs should have averred in their complaint that there was a mutual mistake between the plaintiffs and defendant as to the terms of said policy; (5) in holding that there was no allegation in the plaintiffs' complaint of an agreement between the parties as to the specific terms of the new policy that was to be issued; (6) in not holding that, as the defendant had agreed to re-

new said insurance on the same terms and conditions as stated in the old policy, for the same premium, and issue a policy therefor, it was immaterial, under the circumstances in this case, whether the failure to perform said agreement on the part of the defendant was by mistake or design; (7) in holding that the plaintiffs were guilty of such gross laches in not examining the new policy that they are not entitled to relief, and in holding that the defendant was excused in the performance of its contract because the plaintiffs did not detect its omission to deliver such a policy to the plaintiffs as it agreed to till after the fire; (8) in holding that it was the duty of the plaintiffs to detect, and notify the defendant of, an alteration which the defendant made, and in the very nature of the case must have had knowledge of, to-wit, the changes in the terms and conditions of the new policy from those in the old; (9) in not holding that the plaintiffs were entitled to a correction of said last-named policy in the manner sought, and to specific performance of the agreement stated in paragraph 10, and to judgment for the amount that would be due by said policy, when corrected, by reason of said loss by said fire."

For the purpose of testing the sufficiency of the pleadings we are to assume that the defendant admits that an agreement between it and the plaintiffs for indemnity against loss by fire, containing every stipulation and condition which should enter into or affect it, was reduced to writing, and that the defendant agreed to make and sign a copy thereof, except as to the dates of commencement and termination of risk, and deliver the same to the plaintiffs; that it wrote and signed a policy of insurance, and delivered it to the plaintiffs as and for a performance of its promise, and received the stipulated premium, without notice to them that an important and variant condition had been added to those contained in the first written agreement; and that the plaintiffs, trusting to the defendant's fidelity to its undertaking, omitted to examine the policy for the purpose of discovering variances from the written draft, and did not in fact discover the variance until after damage to the property for which indemnity had been sought.

The presence of the variant clause in the delivered instru-

ment is of necessity due either to intention or mistake upon the part of the defendant. To attribute it to the former is to charge constructive fraud at least; and, inasmuch as the plaintiffs have not charged this specifically, if we accede to the rule of law invoked by the defendant, that unless fraud is so charged it is excluded from the case, there remains the other and only possibility, namely, mistake; and, upon a fair interpretation of the allegation, this, the only possible legal meaning, is to be attributed to it, namely: that the writing, which by the agreement of the parties should have been a copy of a previously written draft, did in fact contain a variant and material clause, which neither of them desired or intended that it should contain, and which neither party would knowingly have permitted to be in it. This meaning the defendant should have found therein, and to it made answer.

That it is a most frequent and useful office of a court of equity to reform written contracts, and make them conform to the verbal agreement or written draft which of necessity precedes them, is in the knoweldge of all, and it is sufficiently accurate to say that no writing is beyond its reach if the prayer for relief is presented in due season, and supported by convincing evidence. Of course, the presumption in favor of the written over the spoken agreement is almost resistless; and the court has wearied itself in declaring that such prayers must be supported by overwhelming evidence or be denied. But in the case at bar the defendant volunteers to lift this burden from the plaintiffs, and upon the pleadings admits that the delivered policy is materially variant from the precedent written draft agreed upon. There are many precedents for the reformation of policies of insurance in cases where the insured has held the policy, until after a loss, in silence and in ignorance of the necessity for such reformation,—ignorance because of the omission to read the policy, or of a careless reading. A few are cited.

In Andrews v. Essex Ins. Co., 3 Mason, 10, Story, J., said; "There cannot at the present day be any serious doubt that a court of equity has authority to reform a contract where there has been an omission of a material stipulation by mistake. And a policy of insurance is just as much within the

reach of the principle as any other written contract. But a court of equity ought to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought, therefore, in all cases to withhold its aid where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract which it was designed to execute. But even here there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party to go to the extent now required. And these considerations acquire additional force where circumstances have occurred in the intermediate time which give an increased importance to the asserted mistake. Under these limitations the doctrine of courts of equity on this subject does not seem at variance with general convenience or justice."

In I Story, Eq. Jud. § 159, it is said as follows: "The relief granted by courts of equity in cases of this character is not confined to mere executory contracts, by altering and conforming them to the real intent of the parties; but it is extended to solemn instruments which are made by the parties in pursuance of such executory or preliminary contracts; and indeed, if the court acted otherwise, there would be a great defect of justice, and the main evils of the mistake would remain irremediable. Hence, in preliminary contracts, for conveyances, settlements, and other solemn instruments, the court acts efficiently by reforming the preliminary contract itself, and decreeing a due execution of it as reformed, if no conveyance or other solemn instrument in pursuance of it has been executed. And, if such conveyance or instrument has been executed, it reforms the latter also by making it such as the parties originally intended."

In Oliver v. Mutual Commercial Ins. Co., 2 Curt. 277, the marginal note is as follows: "If a policy, when drawn and received, does not correctly express a previously concluded

agreement for insurance which it was designed by both parties to execute, equity will reform it. If underwriters conclude an agreement for insurance with one known to them to be merely an agent, and nothing is said as to whose account the insurance is to be made upon, the agent has a right to a policy insuring him as agent, or for whom it concerns. If the agent makes a mistake in declaring the interest, equity requires it to be corrected, and the policy reformed. There is a distinction between the correction of a mistake in a written contract and in the execution of a power. In the latter case, courts interpose more willingly. But if the agent did not declare the interest in the wrong person by mistake, but through a fraudulent design, equity will not relieve the principle. If a party fails through mistake to obtain such a policy as he is entitled to by an existing valid contract, equity will relieve, though the mistake arose from ignorance of law."

In North American Ins. Co. v. Whipple, 2 Biss. 419, the court says: "It is easy to see how, in the filling up of printed blanks, a mistake like that alleged by the complainant might happen; and the policy clerk says that it occurred from the fact that he was accustomed, in the majority of instances, to fill up yearly policies. All the other policies were made out for two months; that is, they expired on the twenty-second of December, 1864, instead of the twenty-second of December, 1865. This is not contradicted by the defendant. The defendant himself, who personally procured this insurance, has no recollection, or does not testify to any, in regard to what transpired at the time he applied for the insurance. He admits that he obtained the insurance at the time mentioned, but does not profess to remember the time the policies were to run, from anything he can now recall of the transaction. It is shown in the proofs, and I presume it would be taken notice of without proof, that fourteen months is an unusual time for the life of an insurance policy. The usual time is two, three, four, six, and twelve months; and if, for any reason, the defendant had had occasion to apply for a policy so much out of the usual course of business, it would have made some impression upon his memory, and that of the clerks and agents of the insurance company who participated in the transaction. So, also, the

fact that only so small an amount was paid for a policy having so long a time to run, would seem to be a circumstance calculated to excite attention and impress itself upon the memory. It is true that the defendant testifies that he afterwards sent his policies to the insurance agents to have them looked over and mistakes corrected; but both the agents deny that they they ever saw this policy, and assert positively that they supposed the same had expired on the twenty-second of December, 1864, and had so entered the same on their books, and so informed the complainant, and had no knowledge that the policy in question was claimed to be in force until after the fire. Under the evidence in this case I can but conclude that the substantial allegations in the bill are made out by the proofs, and that the complainant is entitled to the relief prayed for."

In Phœnix Fire Ins. Co. v. Gurnee, 1 Paige, 278, the marginal note is as follows: "A court of chancery has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. The evidence of the mistakes in all cases should be clear and satisfactory." Chancellor Walworth said in this case: "It is well settled that a court of equity has jurisdiction to correct mistakes in policies of insurance, as well as in all other written instruments. Phil. Ins. 14. But the evidence of such mistake, and that both parties understood the contract in the manner in which it is sought to be reformed, should be clear and satisfactory. In policies of insurance the label or written memorandum from which the policy was filled up is always considered of great importance in determining the nature of the risk and the intention of the parties. Thus, in Motteux v. London Assur. Co., 1 Atk. 347, Lord Hardwicke held that a policy ought to be rectified agreeably to the label; and in the issues which he directed in that case the label was treated as the real contract between the parties. In this case there is a substantial difference between the policy and the written memorandum on which it is founded."

In Wood on Fire Insurance (section 484) it is said as follows: "When an application for insurance is made and accepted, and a policy is issued which, either by mistake or fraud on the part of the insurer, essentially varies from the

contract made, and the policy is not seen or examined by the assured until after the loss thereunder occurs, he is not estopped from seeking a reformation of the contract upon the ground that he accepted the policy. Thus, where the plaintiffs entered into a contract for insurance with the defendant's agent, and paid him the premium, and took from him a receipt stating that the insurance was for $10,000 upon 'merchandise generally contained in their three-story brick building, metal roof, and occupied by them as a commission house,' and a policy was issued containing all the provisions of the contract except the words *'as a commission house,'* and the policy was received by a clerk of the plaintiffs, and its terms were not known to the assured until the loss, it was held that, 'inasmuch as the insured refused to pay the loss upon goods held by commission, the assured were entitled to have the policy made to conform to the agreement, and could not be said to have accepted the change in the contract as indicated by the policy. The fact that proceedings are not instituted for its reformation until after a loss does not of itself bar the remedy. It is a circumstance to be taken into consideration in connection with other circumstances in determining whether the plaintiffs waived the variance, but, if the delay is excused, the remedy remains.' "

In Van Tuyl v. Westchester Fire Ins. Co., 55 N. Y. 657, the plaintiffs procured insurance upon their stock and materials in their manufactory. One of the printed conditions declared it void in the case of the establishment running, in whole or in part, over or extra time, or running at night, without special agreement. The plaintiffs gave evidence to show that they previously insured with the defendant, but had the policy canceled because of the condition above mentioned being in it; that the plaintiff's agent informed the defendant that the United States Insurance Company of Baltimore was writing on the property, and that their policy did not contain that clause; that the defendant thereupon agreed to write as the other companies did, and to follow the form of the United States policy, which the plaintiffs were to and did furnish for the defendant to copy. The plaintiffs thereupon produced a blank form, which the witness testified was

a blank policy of the latter company. This was offered in evidence, and was objected to upon the ground that the copy shown the defendant should be produced, and that a blank form not filled up was not proper evidence. The objection was overruled, and the defendant excepted. The plaintiffs also gave evidence tending to show that they did not discover that the permission required was not in the policy until after the fire. The evidence as to the agreement was denied by the defendant's agent who effected the insurance. It was held that the plaintiffs were entitled to have the policy reformed. See, also, New York Ice Co. v. North Western Ins. Co., 23 N. Y. 357; National Fire Ins. Co. v. Crane, 16 Md. 260; Harris v. Columbiana Co. Ins. Co., 18 Ohio, 116; Weed v. Schnectady Ins. Co., 7 Lans. 452; Bidwell v. Astor Ins. Co., 16 N. Y. 263; Brioso v. Pacific Mut. Ins. Co., 4 Daly, 246; Bunten y. Orient Ins. Co., 41 N. Y. 667; Malleable Iron-Works v. Phœnix Ins. Co., 25 Conn. 465; Bennett v. City Ins. Co., 115 Mass. 241; Moliere v. Pennsylvania Fire Ins. Co., 5 Rawle, 342; National Traders' Bank v. Oceans Ins. Co., 62 Me. 519; Lippincott v. Insurance Co., 3 La. 546; Franklin Ins. Co. v. Hewitt, 3 B. Mon. 232; Law v. Warren, 6 Ir. Eq. 299.

In National Traders' Bank v. Ocean Ins. Co., 62 Me. 519, it is said as follows: "This is a bill in equity asking the court to reform an insurance policy. The authority of the court to grant the relief prayed for is conceded. The only question is whether the evidence of mistake is such as to justify the court in exercising its authority. * * * As there can be no recovery upon the policy as it is now written, for the reason that between the voyage insured and the one actually made by the vessel there would be apparently a fatal deviation, the plaintiffs ask to have the policy reformed so that it will describe the voyage correctly. We think the relief prayed for should be granted. Where, as in this case, an insurance company undertakes to insure the charter of a vessel after being informed that no copy of the charter has been received, and it is not known how many ports she will be required to use, and through mistake the policy is so written as to limit the vessel to the use of one port when in

fact her charter requires her to use two, we think a court of equity should order the policy reformed so as to make it describe the voyage correctly. The mistake in this case seems to be established beyond the possibility of doubt. The policy and the charter are both written instruments. A comparison of the two demonstrates that the voyage described in the charter is misdescribed in the policy. Can there be any doubt that the misdescription was the result of mistake? We think not. It is impossible to believe that the applicant for insurance knowingly paid the premium for a void policy. Nor would it be just to the officers of the insurance company to suppose that they took a premium for a policy known to them to be of no value. The conclusion is therefore inevitable that the misdescription was the result of a mistake,—a mutual mistake,—a mistake in which both parties participated; and we think equity and good conscience require that it should be corrected."

In Buckland v. Adams Exp. Co., 97 Mass. 132, the court said: "On a consideration of the facts stated, it does not appear to us that the plaintiffs ever did agree that the merchandise in question should be transported on the terms set forth in the receipt which was delivered to the workman at the manufactory when the package was delivered to the defendants' agent. It is not stated that the plaintiffs, or either of them, ever read the paper containing the alleged regulations, or one similar to it. It is agreed that the defendants received and carried like packages of merchandise for the plaintiffs at or about the time the one in controversy was delivered for carriage without giving the plaintiffs any receipt whatever therefor, and that this was the course of dealing between the parties in a large majority of the instances in which the defendants had been employed by the plaintiffs. From this it would appear that the ordinary course of business was for the defendants to receive merchandise from the plaintiffs without attempting to limit their liability as carriers in any manner whatever. Under these circumstances we cannot fairly infer that the plaintiffs understood that by the delivery of a receipt for the merchandise the defendants intended to limit the liability which they ordinarily assumed in their dealings with

the plaintiffs, or that the latter understood and assented to the contents of such receipt as fixing the terms on which the defendants were to transport the merchandise."

In National Fire Ins. Co. v. Crane, 16 Md. 295, the court said: "Whatever effect the want of such an indorsement may have at law in an action on the policy, we think it cannot be urged in a court of equity in a cause otherwise free from objection. The judge below has correctly stated the law on the subject. The indorsement could have been made only by the company. If it be omitted, who is to blame? Certainly not the assured. These policies contain many stipulations, some of them operating as conditions percedent for the benefit of the company, and few for that of the assured. It is too common for applications to be met and adjustment refused on frivolous and unjust pretenses, in order to defeat fair claims on contracts of which good faith is the very essence, and we think it would promote the interest of insurance companies, and tend to a higher state of morals in business transactions, if they would exhibit more readiness to settle demands upon them than, as we discover from the numerous reported cases on the subject, appears to be usual with them. In this case the president of the company dictated the application himself. The prior insurance was made known to him. The parties relied upon him. They never went to the office of the company. He came to the counting-house of the complainant, seeking the risk; and, after hearing all they had to say on the subject, he departed, and soon after sent the policy and received the premium; his clerk saying that it was all right, the only defect, however, being that the company had omitted part of its own duty in not indorsing the former insurance. In such a case we are called upon to say that the party is without remedy. On the contrary, we think it would be a reproach to the jurisprudence of the state if this company were discharged from their contract on any such grounds. There is a distinction in cases where the preparation of an instrument belongs to the party to become liable under it; he ought in that case to be dealt with more strictly. (Ex parte Wright,) 19 Ves. 257. Insurance contracts are within this principle, and equity will interpose, not only in cases of fraud, but also of

mistake, where a policy is drawn up in a form different from the application, or anything is omitted which it is the duty of the company to insert or indorse on the instrument. Collett v. Morrison, 12 Eng. Law & Eq. 171."

In Bidwell v. Astor Ins. Co., 16 N. Y. 266, it is said: "That the contract of insurance agreed to be made by the defendants was such in its character as the plaintiffs have alleged in their complaint, has been found by the judge, and is conclusive upon us. The fact on which the appellants rely, that the policy actually made out was in the plaintiff's hands for a considerable time and until the loss had occurred, was a circumstance to be weighed by the judge as bearing upon the truth of the plaintiff's allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiff. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations. Phoenix Fire Ins. Co. v. Gurnee, 1 Paigne, 278."

It is a matter of common knowledge that a policy of insurance against fire at the present day, is a lengthy contract, which, after specifying the main things, namely, the subject, its location, the owner, the amount, the time, and the price,—embodies very many stipulations and conditions for the protection of the underwriter. If a person desiring imdemnity against loss applies to the underwriter, and states the main things above enumerated, and says no more, he has knowledge that he has asked for and will receive a contract which, in addition to those, will contain many limiting conditions in behalf of the party executing it; and, when he receives the policy, he cannot avoid seeing and knowing that there are many more stipulations in it than were covered by his verbal request. It may well be that a due regard for the rights of others requires him to examine those stipulations, and express a timely dissent, or be held to an acceptance thereof. Nothing which has previously transpired between him and the underwriter furnished justification for omission to read

them. The underwriter has not invited his confidence by any promise as to what the writing shall contain or omit.

But if the underwriter solicits a person to purchase of him indemnity against loss by fire, and if they unite in making a written draft of all the terms, conditions, and stipulations which are to become a part of or in any way affect the contract, and if the underwriter promises to make and sign a copy thereof, and deliver it as the evidence of the terms of his undertaking, and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained the court will not hear the claim that he is entitled to the benefit of the variant condition, where the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not, for his pecuinary advantage, to impute it to another as gross negligence that the other trusted to his fidelity to a promise of that character.

The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to this limitation, namely; that it is not to be applied in behalf of any person who by word or act has induced the omission to read. The defendant has brought to our notice a few of the many cases in which the rule has been plainly declared; but we think that in few or none of these did the party seeking to enforce it subject himself to this limitation.

There was in the first written draft agreed upon by the plaintiffs and defendant the contract between them. In all its terms and conditions it became, and has hitherto continued to be, operative. The draft of another and variant one has not annulled or affected it, because the last has not in the eye of the law been accepted by or become obligatory upon the plaintiffs. That contract the defendant had the right to rescind,—a right which it has possessed in its fullest measure, because it was not affected by the delivery of the variant one, not accepted by the plaintiffs; and if, because of its own negligence in

omitting to execute and deliver a true copy of the original agreement, it resulted that it was induced to refrain from exercising its right of rescission, it must accept the consequences, rather than cast the burden upon the plaintiffs.

There is error in the judgment complained of, and it is reversed.

Accord. Providence Wash. Ins. Co. v. Brummelkamp, 58 Fed. 918.

FITCHNER v. FIDELITY MUT. FIRE ASS'N.

Supreme Court of Iowa. Oct. 1897. 103 Iowa 276.

Reformation of Policy. Decree for Plaintiff. Defendant Appeals.

Ladd, J. 1. The three questions presented are: Was there a mistake? If so, can it be corrected? And was there any incumbrance on the property? The firm of George H. Fitchner & Co., composed of Fitchner, who lived at Correctionville, and H. C. Laub, whose home is at Denison, was engaged in trade at Correctionville, owning a building valued at from $9,000 to $12,000, and a stock of merchandise estimated to be worth from $14,000 to $20,000, at the date of the policy. P. A. Doughty, as soliciting agent of the defendant and other companies, procured from Laub, at Denison, applications for $6,000 insurance on the stock and $5,000 on the building. The applications were written by Doughty, and, being unable to complete them before leaving, were finished after Laub had signed them. The latter testifies that he told Doughty that he wanted to place $12,000 insurance on the merchandise and $8,000 on the building, and that Doughty advised him to take more, and wanted to write applications for all of it. This Laub refused, stating he had promised insurance in a company at Sioux City, and some to parties at Council Bluffs. Doughty concurs in all this, except as to

amount on the building, and says Laub requested permission for other insurance, and he told him he might exercise his discretion in that, provided he did not exceed three-fourths of the value of the stock; that in writing the application, through a clerical error, the total concurrent insurance was fixed at $12,000 on all the property, instead of being limited to the merchandise. While there was talk that the stock would be increased later in the fall, this had no reference to the arrangement concerning the amount of insurance at that time. These were the only witnesses to the transaction, and, without doubt, both understood there was to be $12,000 insurance on the stock, and that it was not so limited through the error of Doughty in writing the application. Seldom is a mistake more conclusively established.

2. It is said Laub ought to have discovered the mistake. The applications were very hastily prepared by Doughty, as he wished to make a train. He worked on them till near midnight. Laub testifies that he was tired out and did not read the applications. They were signed, and afterwards completed by the agent. The amount of insurance he wished to carry had been fully discussed and agreed to. Doughty was the agent of the company, and acted in that capacity in preparing the applications. The insured ordinarily rely upon the agent to properly set out the facts in the applications, and Laub did as men usually do in assuming that the defendant's agent had done his duty. Stone v. Insurance Co., 68 Iowa, 737, 28 N. W. 47; McComb v. Insurance Co., 83 Iowa, 247, 48 N. W. 1038. The mere failure of the assured to read his application, or the copy of it on the policy, does not establish negligence. Bennett v. Insurance Co. 70 Iowa, 600, 31 N. W. 948; Hagan v. Insurance Co., 81 Iowa, 321, 46 N. W. 1114; Donnelly v. Insurance Co., 70 Iowa, 693, 28 N. W. 607; Boetcher v. Insurance Co., 47 Iowa, 353. Nor is the mere omission to read the policy negligence. Barnes v. Insurance Co., 75 Iowa, 11, 39 N. W. 122; Jamison v. Insurance Co., 85 Iowa, 229, 52 N. W. 185; Boetcher v. Insurance Co., supra. Laub had no reason to suppose the policy and application were drawn differently than understood. As to matters affecting the rights of the firm at the time the policy

was delivered, or in the future, it must be charged with notice, but the law did not require him to search through the policy to ascertain past mistakes or misstatements of the agent or company. Under the circumstances disclosed, it cannot be said that the plaintiff was negligent in failing to discover the error of the defendant and its agent.

3. Doughty had the information that the firm then desired and was placing $12,000 of concurrent insurance on the merchandise, and the company was charged with the same knowledge. This was a condition of things then existing, and incident to the very business of insurance. Application to all of the companies could not be made at precisely the same time, nor could the policies be so issued. If the plaintiff was actually arranging for other insurance to cover the same property at that time, and had definitely fixed its amount, this was a fact, and not in the nature of an expression of a desire to recognized in Insurance Co. v. Wood (Neb.) 69 N. W. 941, procure other insurance at some future date. This rule is relied on by the defendant, and sustained in Hagan v. Insurance Co., supra.

4. Whether a soliciting agent may enter into a contract with reference to insurance is not involved in this case. Doughty was bound to set out the material facts as stated by Laub in the application, and, through a mistake on his part, failed to do so. Under such circumstances, the company is estopped from availing itself of the error in the application in order to defeat recovery. Stone v. Insurance Co., supra; Eggleston v. Insurance Co., 65 Iowa, 308, 21 N. W. 652; Reynolds v. Insurance Co., 80 Iowa, 563, 46 N. W. 659; Key v. Insurance Co., 77 Iowa, 174, 41 N. W. 614; McComb v. Insurance Co., supra. Here the mistake has been carried into the policy. This the company issued on the basis of facts disclosed to the agent, and the conditions as they existed, and of which it is presumed to have knowledge. Having accepted and retained the premium and issued its policy, it is presumed to have intended to do so with reference to existing conditions known to it; and its failure to do so, while it may have resulted from the mistake of its agent, amounted to a fraud on the plaintiff. That equity will grant relief in such cases is not

an open question, see Boetcher v. Insurance Co., supra; Esch v. Insurance Co., 78 Iowa, 334, 43 N. W. 229; Barnes v. Insurance Co., supra; Jamison v. Insurance Co. (Iowa) 52 N. W. 185.

5. This clause is contained in the policy: "This contract shall be void and of no effect unless consent in writing is indorsed hereon by the secretary in each of the following instances, viz.: If the insured shall now have, or hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this contract." Applications for other insurance on the building were prepared by the same agent at the same time, and policies issued thereon. If, then, the policy is not reformed, as no estoppel is pleaded, the taking of additional insurance on the building without permission rendered it void from the day it was delivered. But the prayer of the petition, in asking that the policy be reformed so as to permit $20,000 concurrent insurance, "and for such other and further relief as plaintiff may be or show himself entitled to," includes this relief. It was not necessary to state the very phrase the plaintiff would have included in the policy, but making the allegations and prayer broad enough to include the relief to which the plaintiff is entitled was quite sufficient. The evidence shows that Laub represented that the firm was then arranging for and placing $8,000 insurance on this building, and that this was omitted in the application. The policy should have been so drawn as to permit this amount of concurrent insurance thereon. An amendment to the petition alleges a contract between the plaintiff and defendant's agent. No contract was made by such agent, nor did he have authority so to do. Apparently the pleader intended to allege that Laub and the agent agreed there might be an unlimited amount of insurance on the building, and $12,000 on the stock. What contracts these parties may have made is quite immaterial. The important question is, what material facts connected with this policy of insurance did Laub make known to Doughty, which the latter failed to include in the application, and the company omitted from the policy? and as to those the plaintiff is entitled to relief.

6. In 1888 the plaintiff executed a mortgage to Eliza Ann Hughes on the building and lots, and, after being recorded, it remained in the possession of Laub. The mortgagee was a fictitious person, and the mortgage was never delivered. It seems to have been prepared by Laub with the purpose of protecting himself against any possible misconduct of his partner. But as there was no debt, no mortgagee, and no delivery, there could have been no incumbrance such as is prohibited by the policy. Affirmed.

Note. In a Miss. case the agent had authority to issue permits for the property to become vacant; and it was the custom to issue the permit and attach it to the policy. The insured requested the agent to grant a vacancy permit; the agent agreed to do so, but before the permit was issued the agent left the state. *Held* after loss insured could maintain an action to reform the policy. Miss. Fire Ass'n v. Stein, 86 Miss. 499, 41 So. 66. Where there was an ambiguous condition appearing by reason of a discrepancy between the policy and a rider attached thereto as to other insurance, it was held by the Supreme Court of Minn. that the policy should be reformed. Kelley v. Cit. Mut. Fire Ass'n 96 Minn. 477, 105 N. W. 675.

MALLETTE v. BRITISH-AMERICAN ASSUR. CO. of TORONTO, CANADA.

Court of Appeals Maryland. June 1900. 91 Md. 471.

Renewal of Policy.

Pearce, J. This is an action brought by William H. Mallette, for the use of Susan M. Thomas, as mortgagee, to recover from the appellee $1,150 for the loss of property destroyed by fire. There are three counts in the declaration; the first being upon a verbal agreement to insure certain buildings in Oakland, Md., for the use of Susan M. Thomas, for an amount not exceeding $1,150, for one year from June 21, 1898, in consideration of a premium of $33.75, part of which was then paid, and the residue of which it was agreed should be paid in

a few days thereafter, no reference being made in this count to any other terms or conditions of the agreement than those above mentioned. The second count set forth the execution of a written policy of insurance, on the same buildings, in favor of the plaintiff, for the use of Susan M. Thomas, for one year from June 21, 1897, to the amount of $1,150, in consideration of a premium of $33.75 then paid, and a verbal agreement, made shortly before the expiration of said policy on June 21, 1898, in consideration of the further sum of $33.75 to renew said policy for the same amount, and upon "the same identical terms, agreements, covenants, and stipulations as were contained in said policy, for the further term of one year from June 21, 1898," and alleged that the plaintiff then paid a part of said renewal premium, and promised to pay the remainder in a few days, which payment and promise were accepted by the defendant as satisfactory. Both counts averred, in due form, the loss sustained, and demand for, and refusal of, payment. To both these counts the defendant demurred, and the circuit court for Garrett county overruled the demurrer as to the first count, but sustained it as to the second count. Under leave of court, a third count was then filed, setting forth the execution of the same policy for one year from June 21, 1897, as was set forth in the second count, and in the same language, and then alleged that shortly before June 21, 1898, when said policy was about to expire, the defendant, in consideration of the further sum of $33.75, renewed said policy for another year from June 21, 1898, "on the same terms and conditions as those contained in said written policy, which said renewal was made by verbal agreement between the plaintiff and defendant; and plaintiff paid thereon part of the premium, and promised to pay the balance, which payment and promise were accepted by the defendant as the consideration for said renewal." The loss, demand for, and refusal of, payment was duly set forth. Defendant demurred to this count, also, and the demurrer was overruled. The general issue pleas were then filed, as also pleas specifically denying that the defendant either renewed, or agreed to renew, said policy for any period after June 21, 1898. The case was then removed to Washington county,

where a trial by jury was had, and, at the close of the testimony on both sides, the plaintiff offered one prayer, framed upon the theory of the third count, which had been sustained on demurrer, and asking the court to instruct the jury that the facts recited therein, if found by it, constituted a renewal of the policy offered in evidence; and the defendant offered a prayer that there was no evidence legally sufficient to entitle the plaintiff to recover under the pleadings in the case. The court rejected the plaintiff's prayer, and granted the defendant's prayer, to which action of the court the plaintiff excepted, and has brought this appeal.

We will consider, first, the ruling upon the demurrer to the second count, which may be very briefly disposed of. We are of opinion that this count is defective, if for no other reason, because it fails to set forth with sufficient fullness and clearness the terms, agreements, covenants, and stipulations contained in the former policy, and which were to be inserted in the renewal of the policy.

We come next to the ruling of the court upon the defendant's prayer, by which the jury were instructed that there was no evidence legally sufficient to entitle the plaintiff to recover under the pleadings in the cause. It is always competent, by reference to the pleadings, to ask for the judgment of the court upon their legal sufficiency and effect with respect to the evidence offered, but, before a prayer can be granted withdrawing a case from the jury, the court must assume the truth of all the evidence before the jury tending to sustain the claim or defense, as the case may be, and of all inferences of fact fairly deducible from it; and this, though such evidence be contradicted in every particular by the opposing evidence in the cause. Railway Co. v. Wilkinson, 30 Md. 230; Jones v. Jones, 45 Md. 154. It was argued, as to the first count, that no evidence whatever was offered to sustain it, because, as we understand the argument made, the contract there set out was a contract for original insurance, not for renewal of an existing policy, while the evidence offered all shows a previous insurance, and shows, or tends to show, an agreement for renewal. But it is wholly immaterial whether the agreement was for original insurance

or for renewal, because in either aspect the contract is a contract to insure. As to the second count, which alleges an agreement to renew the existing policy, and as to the third count, which alleges an actual renewal, it is contended there was no contract whatever shown to have been made between the parties, because there was no evidence to show that this particular policy was agreed to be renewed, or was renewed, or what the terms and conditions of renewal were. But the testimony of Mrs. Mallette is clear that Mr. Thayer, the defendant's agent, wrote to inquire whether her husband wished to have renewed the two policies, expiring June 21, 1898, and that she told him her husband directed her to reply that he wished these two policies renewed, and would send him a check for the premium soon, and that he replied: "All right, Mrs. Mallette, all right. I will attend to it." Mr. Thayer, on cross-examination, admitted he knew she referred to these two policies, and that he did not tell her he did not intend to renew them without payment of the premiums. We cannot doubt, therefore, that the policy now under consideration, which was one of the two maturing June 21, 1898, was included in the renewal offered by Thayer and accepted by Mallette. As to the objection that nothing was said as to the terms and conditions of renewal, we hold that, where there is an agreement for a renewal of a policy, the insured is justified in assuming that the premium, and all the terms and conditions of the renewal, will be the same as those of the original, unless he has notice of some proposed change. This would hardly seem to need authority, but, if desired, it will be found in Insurance Co. v. Walsh, 54 Ill. 164, where it was held that, "unless otherwise expressed, a renewal of an insurance policy is on the same terms and conditions as were originally contained in the policy." Moreover, in the present case, the very terms of the policy so provide, as appears from the following clause: "This policy may, by a renewal, be continued under the original stipulations in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void." We therefore think there was no uncertainty as to the policy

to be renewed, or as to any of the terms and conditions of renewal, and, there being abundant evidence tending to show an agreement for the renewal of the policy in question, it was error to withdraw the case from the jury, as was done in granting defendant's prayer.

The plaintiff's prayer, which was rejected, sets out at length and in detail all the facts attending the alleged agreement for a renewal of the policy. It was strenuously argued by the appellee that the policy could not be renewed without actual payment of the full premium, and that the agent could not waive this requirement, and for this contention reliance was placed upon the case of Bradley v. Insurance Co., 32 Md. 108; but the policy here does not provide, as it did there, that the company should not become liable until the premium in full therefor was actually paid, and that, if not paid within 15 days, the policy should be null and void. In deciding that case, Judge Alvey said: "The cases cited and mainly relied on by the appellant have no application to this case. They were instances in which the insurers were held to have waived the right to receive the premium as a condition upon which the risk was to attach, upon the ground that the asured would have been otherwise misled and deceived." Among the cases thus referred to were the cases of Tayloe v. Insurance Co., 9 How. 390, 13 L. Ed. 187; Commercial Mut. Ins. Co. v. Union Mut. Ins. Co., 19 How. 318, 15 L. Ed. 636; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Post v. Insurance Co., 43 Barb. 351, and others; and the implication is strong that these cases were approved by this court in Bradley v. Insurance Co., 32 Md. 108. The present case comes directly within the reason of these, as, upon the undisputed testimony, the plaintiff was misled and deceived by the conduct of defendant's agent. It is well settled that credit may be given for the premium, notwithstanding the policy may provide that the insurance shall not be considered binding until actual payment, and that, if credit be given by such an agent as Thayer, it will not affect the validity of the contract. Emery v. Insurance Co., 138 Mass. 413; Angell v. Insurance Co., 59 N. Y. 171; Insurance Co. v. Colt, 20 Wall. 560, 22 L. Ed. 423 (the latter case being

cited on this point with approval in Insurance Co. v. Ryland, 69 Md. 447, 16 Atl. 109, 1 L. R. A. 548); Alexander v. Insurance Co., 67 Wis. 427, 30 N. W. 727. In the last case, a premium note was payable in annual installments, and the policy provided that the liability of the company should cease upon failure to pay any installment. The agent agreed to give notice to the insured 15 days before any installment became due, but failed to do so; and before the policy expired, and while installments were overdue and unpaid, a loss occurred, and it was held that the condition as to the termination of liability had been waived, and that the insured did not forfeit her rights under the policy by neglecting to pay the installments as they fell due. The court said: "This rule is absolutely necessary for the protection of the insured. The insured deals with no one but the agent. The company cannot deal with its patrons in any other way. Justice and law, therefore, require that the company shall be held to sanction what the agent agrees to, and upon which the insured relies. To allow the company to enforce a condition or forfeiture of the policy for a neglect to do that which the agent informs the assured shall not avoid the policy would work the greatest injustice." See, also, Newark Mach. Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, reported in 22 L. R. A. 768, and 11 Am. & Eng. Enc. Law, p. 333, for a collection of the cases showing the agent's authority to waive payment of premiums. In Insurance Co. v. Keating, 86 Md. 131, 38 Atl. 29, it was held that a clause in a policy providing that no agent shall have power to waive any of its conditions except such as by its terms may be indorsed thereon does not apply to conditions relating to the inception of the contract, but operates to prevent agents from modifying the terms of the policy after it has been issued; and in Insurance Co. v. Eicholtz, 88 Md. 92, 40 Atl. 706, the acceptance of part of the premium was held a waiver of nonpayment of the residue. Here, the proof is that, on June 25th, Mallette sent Thayer a check on account of insurance for $20, with a promise to send more in a few days; that Thayer accepted the check and collected the money, and that at that time only $10 was due for premiums on policies other than that here in question,

thus leaving in Thayer's hands for insurance premiums $10, applicable to this policy as the only one then not paid up; and the plaintiff's prayer carefully and properly left to the jury to determine whether Thayer accepted the check for that purpose. The prayer was claimed to be defective on the ground that the waiver of payment of the premium in full by the agent could not bind the company, but we have seen that the decided weight of authority is to the contrary. We think the plaintiff's prayer properly submitted the whole law of the case, and in a more favorable light to the defendant than it could demand, since, under the decisions referred to, the acceptance of a promise to pay the premium, without actual payment of any part, would be a sufficient consideration to support the contract. For the reasons given the judgment will be reversed, and the cause be remanded for a new trial. Judgment reversed and cause remanded, with costs to the appellant above and below.

Accord. Phoenix Ins. Co. v. Hale, 67 Ark. 433, 55 S. W. 486; Able v. Phoenix Ins. Co., 62 N. Y. S. 218. Where there are no additional stipulations the terms of the original policy control. 101 Me. 124, 63 Atl. 552. An agreement with an insurance agent to look after all insurance the insured would place with him and renew all policies as they expired is an individual contract of the agent. Wood v. Prussian Nat. Ins. Ass'n, 99 Wis. 497, 75 N. W. 173.

MICHIGAN MUT. LIFE INS. CO. v. REED.

Supreme Court of Michigan. Feb. 1891. 84 Mich. 524.

Rescission. Misrepresentation of Agent.

McGrath, J. This is *assumpsit*, brought in justice court, upon a note given by defendant for a portion of the second semi-annual premium on a policy of insurance issued by plaintiff upon the life of defendant. Defendant, with his plea, gave notice that the signature to the note was obtained by fraud, and that the note was without consideration. Defendant was a

switchman in the employ of the Lake Shore road, at Adrian. One Vanderburg, an agent of plaintiff, who resided at Adrian, and had known defendant for some time, solicited the insurance, took the application, delivered the policy, and took some cash and three notes for the first year's premium. The policy was dated November 28, 1888. Two of the notes were paid, and defendant refused to pay the third, which matured about September 1, 1889. The application was filled out by Vanderburg, and presented to defendant for signature. Defendant insisted that Vanderburg had been acquainted with him for years, knew all about his occupation, and filled out the application largely from his (Vanderburg's) knowledge of the facts; that no questions were asked as to occupation, and defendant did not read the application before signing it, but relied upon Vanderburg; that defendant was a switchman engaged at the yard, and was upon and about trains as they were being made up; that the policy, with a copy of the application attached, was delivered to him in January, 1889; that some days afterwards, in examining the policy and copy of the application he discovered that his occupation was given as "assistant yardmaster, does no switching, don't go near trains;" that thereupon he called Vanderburg's attention to this misstatement, and told him that he was not a yard-master; that he did switching, and did go near trains; that thereupon Vanderburg took the policy for the purpose of sending it to the company for the purpose of correction; that afterwards Vanderburg returned the policy to defendant, saying that the change had been made, and that it was all right; that, supposing that the application had been changed to conform to the facts, defendant did not examine it for some time, but when he did finally examine it he found that it read "assistant yard-master, don't couple cars or do switching;" that upon this discovery defendant saw Vanderburg, accused him of again misrepresenting defendant, and told him that he (defendant) was not protected by the policy, and tendered it back to Vanderburg; that Vanderburg claimed that he had no right to receive it; that several conversations were had with Vanderburg, who finally advised him to send it back to the company, which he did on or about September

26, 1889. The application contained the usual printed clause, declaring "that the above is a fair and true answer to the foregoing questions, and I hereby agree that these statements, with this declaration, shall form the basis of the contract for assurance, and that any untrue or fraudulent answers * * * shall avoid the policy, and forfeit all payments made thereon." The policy provides in terms that "no agent has power to change the terms of this contract," and contains the further provision that "the person whose life is here-by insured shall not engage in blasting, * * * or be regularly employed * * * as a mariner, engineer, fireman, conductor, laborer, in any capacity * * * upon railroad trains."

The plaintiff requested the court to charge the jury as follows: "(1) You are directed to find a verdict for the plaintiff for the amount of principal and interest of note in issue. (2) Even should you find that the agent, Vanderburg, wrote wrongfully the answers in the application for insurance by Reed, which untruthful answers were known to him, Reed, or not, this fact would not relieve the plaintiff from the obligation fixed in the policy; and, in case he should have died during any of the time, prior to the time fixed for the payment of the note, plaintiff would be obliged to pay the wife of insured $1,000, and hence defendant is liable on his note. (3) There is no evidence before you that you can consider that will warrant you to find a verdict for the defendant." The court refused these requests, and instructed the jury as follows: "You are instructed, as a matter of law, that if Mr. Reed, in answering the question as to what his occupation was, said to Mr. Vanderburg that he was engaged in the yard there as a switchman, making up trains, and doing general work about the yards there in connection with trains, and Mr. Vanderburg put in his application, which was the foundation for the issuing of the policy, the statement that he did not go near the cars or do switching, then, I think, gentlemen of the jury, that that would be such a misstatement or fraud practiced upon the insured here as that he would be entitled to have these proceedings rescinded; that is, the policy and notes set aside and held for naught, from the time at least when such rescission should take place upon

his part. * * * You will take all these circumstances into consideration; and if he did know it, but afterwards acted on the policy as if it was in force, and he was bound by it, and the company was bound by it, then he could not assert the defense which he is seeking to assert here; or if the agent, Mr. Vanderburg, put into this application the language as used by the defendant in stating what his occupation was, as he claims that he did, why then, of course, Mr. Reed would not have the right to assert that by way of defense to this note, because, if there was any fraud then, it would be the fraud of the defendant, and not the fraud of the company or its agent." The jury brought in a verdict of no cause of action.

We think the court was correct, both in the refusal to give the plaintiff's requests and in the instructions given. The application here contained absolutely no restriction upon the powers of the agent. The applications are usually filled in in the handwriting of the agent, as was done in this case; and agents are nowhere in the blank prohibited from filling in the application. Indeed, on the face of the printed blank, the very first sentence is as follows: "This blank must be filled by the agent;" and again, in a blank left at the head of the printed blank, is the following: "Agents will note here anything specially regarding the policy applied for, and to whom and where it is to be sent." Although these appear in what might be termed the "caption" to the application, and not in the body of the application, yet to a person not familiar with these blanks it would be misleading if it is intended that the application is to be filled out by the applicant. Again, in the body of the application is the following: "N. B. Agents will be particular to see that all questions in the application are fully answered, particularly whether the age and date of birth agree." Again, in the general printed declaration in the application is the following: "It is hereby agreed that the policy shall not be in force unless the premium is actually paid to the company or its authorized agents." At the bottom of the application are the following printed words: "Approved and recommended by (S. W. Vanderburg) agent;" the name of S. W. Vanderburg being written in in this case. At the head of the filing blank, upon the back of the appli-

cation, occurs the following: "Agents will not fill up this filing." Vanderburg received premium in notes and cash for the company, and must be considered the duly-authorized agent of the company. Had the blank been presented to and read over by the insured before it was filled in, there is nothing contained in it which did not warrant his acting with the agent, just as he claims he did. The application was attached to the policy, and delivered to defendant. The policy contains this provision: "No agent has power to change the terms of the contract;" and also the following: "For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, a copy of the application upon which this policy is based is hereto attached." It must be conceded that the representation in the policy as to the occupation of the insured is untrue, and, if made by the defendant, it would be a good defense to an action upon the policy. The court instructed the jury that, if made by the defendant, it would be no defense to the action upon the note. The jury found that it was not the act of the insured, but of the agent of plaintiff. It has been repeatedly held that, when an application is reduced to writing by an agent of the insured, upon oral statements of the applicant, the conversation betwen the agent and the applicant at the time of putting it in writing is admissible as bearing on the question of the actual contents of the paper, or the representations of the insured; and that, when it appears that the insured fairly and correctly informed the agent as to any fact, and the agent unskillfully, carelessly, or fraudulently misrepresented the insured as to that fact, such unskillfulness, carelessness, or fraud is the unskillfulness, carelessness, or fraud of the company, and is no defense to an action on the policy. Insurance Co. v. Lewis, 30 Mich. 42; Insurance Co. v. Throop, 22 Mich. 146; Crouse v. Insurance Co., (Mich.) 44 N. W. Rep. 496, and cases cited. In Insurance Co. v. Olmstead, 21 Mich. 251, Justice Cooley says: "The agent of the insurance company assumes to have all the requisite knowledge for preparing the proper papers, and volunteered to make them out. He had all the necessary information for that purpose, and nothing

was concealed from him. If the application is not in due form, and if it fails to give all the information called for, it must be either because the agent was too ignorant of his business to be properly intrusted with the agency, or because he was so negligent or reckless that he did not trouble himself to draft them correctly; or, lastly, because he was disposed to take Olmstead's money on fraudulent pretense of giving him indemnity when he knew he was giving none whatever. The general rule undoubtedly is that, in the absence of fraud, accident, or mistake, a party must be conclusively presumed to understand the force of his contracts, and to be bound by their terms. But it cannot be tolerated that one party shall draft the contract for the other, and receive the consideration, and then repudiate his obligation on the ground that he had induced the other party to sign an untrue representation, which was, by the very terms of the contract, to render it void. * * * The forms and requirements of the different insurers are different, and when an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and, after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and has a right to believe, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity on the ground of his agent's unskillfulness, carelessness, or fraud. If this can be done, it is easy to see that community is at the mercy of these insurance agents, who will have little difficulty, in a large proportion of the cases, in giving a worthless policy for the money they receive." In the present case, upon the discovery of the fraud, defendant had the right to rescind the contract. He was not bound to subject the beneficiary named in the policy to a lawsuit after his death, to determine the validity of the policy, especially as in that event his testimony would be wanting. Again, it is not claimed here that the company had actual notice of the facts as to defendant's occupation, but that they had constructive notice only; but it must be remembered that

a copy of the application was attached to the policy, and delivered to the defendant, in which case, under the express provisions contained in the policy relating to the correction of "unintentional errors or omissions" in the application, it was defendant's duty to call attention to this misrepresentation, otherwise the defendant might have been chargeable with a fraud upon the company; for while the company would not be able to avoid a policy by reason of the rule of law that its agent's wrong was the company's own wrong, of which it could not take advantage, it would be otherwise had the assured conspired with the agent, or had the insured been fully informed as to the representation made, and the contents of the application, and neglected to bring it to the attention of the company. The judgment is affirmed.

Accord. McCarty v. New York Life Ins. Co., 74 Minn. 530, 77 N. W. 426.

Note. Where the beneficiary under the policy has obtained a vested right in the policy, it cannot be rescinded at the suit of insured. Jurgens v. New York Life Ins. Co., 114 Cal. 161, 45 Pac. 1054. Where the policy was not in accord with the agreement and the wife of the insured was the beneficiary, it was held that she acquired no vested right that would defeat the action to rescind the contract. LaMarche v. New York Life Ins. Co., 126 Cal. 498, 58 Pac. 1053. If the right to rescind a contract exists, insured is not required to accept the offer of the company to renew the insurance. Delouche v. Metropolitan Life Ins. Co., 69 N. H. 587, 45 Atl. 414.

RAUEN v. PRUDENTIAL INS. CO. OF AMERICA.

Supreme Court of Iowa. Feb. 15, 1906. 129 Iowa 725, 106 N. W. 198.

Application as Part of Contract. Release by Temporary Administratrix.

Weaver, J. On May 7, 1902, one Matthias Rauen, a resident of Mitchell county, Iowa, died testate. At the date of his death said Rauen held a policy of insurance in the defendant

company in the sum of $1,000, payable to his executor. By the terms of his will the testator devised to his wife a life tenancy in all his real estate, and, subject to the payment of his debts therefrom, gave her absolutely all his personal property. Matthias Rauen, son of the testator, was named as the executor of the instrument. Soon after the death of the testator, his widow, Mary Rauen, was appointed temporary administratrix to collect and preserve the property of the estate pending the probate of the will, and acted in that capacity until October following, when the will was probated, and the executor named therein took charge of the estate. Some time after the appointment of the administratrix she notified the defendant company of her husband's death and furnished the required proofs. Thereafter she was visited by an agent of the company, and some correspondence ensued, culminating in a refusal to pay the claim on the ground that the company was relieved from all liability on the policy because, in his application therefor, the deceased had made false representations and warranties as to his medical history and condition of health. This refusal was accompanied by an offer to return to Mrs. Rauen the amount of the premium paid on the policy, $47.99, upon her execution of a receipt tendered by defendant for her signature. Acting, so far as it appears, without legal advice, Mrs. Rauen executed and returned the receipt to the defendant, and received and cashed its check for the amount above mentioned. The check was made payable to "Mary Rauen, Special Administratrix," and is expressed as being "in full for all claims under policy No. 331,808." The receipt was indorsed upon or attached to the policy, and is in the following form: "Newark, N. J., July 23, 1902. Received from the Prudential Insurance Company of America Forty-seven and ninety-nine one hundredths dollars ($47.99), in full for all claims under the within policy terminated by death. Maria Rauen, Special Administratrix." This transaction was never reported to the court, nor in any manner authorized or approved by it. After the probate of the will and the appointment of plaintiff as executor, this action was begun to recover the amount of the policy. To this the defendant appeared and answered, admitting the issuance of the

policy and payment of the premium thereon, and alleging in several counts, by way of defense, that the policy in suit was issued to the deceased upon his written application and medical examination, in which he made material representations as to his physical condition and health, which representations were expressly warranted to be true and made part of the contract between the parties, and that the policy was issued in reliance theron; that said representations and warranties were not true; that the deceased was then suffering with the disease from which he afterward died; and that by reason of said fraud and the failure of said warranties the plaintiff has no right of action on the policy. The answer concedes that no copy of the application or medical examination was ever attached to the policy as required by the insurance statutes of Iowa, but says that the policy was issued and delivered in the state of Minnesota, and it is to be construed and enforced as a Minnesota contract. It also alleges that the only statute in the latter state in any manner corresponding with the Iowa statute upon this subject is section 71, c. 175, p. 430, of the General Laws of Minnesota for 1895, which provides that "every policy which contains a reference to the application of the insured either as a part of the policy or as having any bearing thereon, must have attached thereto a correct copy of the application." By way of further and distinct answer the defendant pleads the transaction had with the widow, by which she surrendered and receipted the policy, as a complete and valid settlement of the claim sued upon. To that part of the answer which pleads the alleged fraud and misrepresentation of the insured in applying for the policy, the plaintiff demurred, because no copy of the application was attached to said policy. To the count pleading the alleged settlement the plaintiff replied, alleging want of power or authority in the special administratrix to bind the estate of her husband by such an agreement, and, further, that said agreement was without consideration and the same was procured by fraud and mistake. The court sustained the demurrer, and upon trial of the issue of fact found the plaintiff entitled to recover. The defendant appeals.

1. The provision of our own Code (section 1819) is that wherever the policy of life insurance makes the application a

part of the contract, or in any manner refers to such application, a copy thereof must be attached thereto or indorsed upon the policy, an omission so to do, while not invalidating the policy, shall serve to preclude the insurance company from pleading, alleging, or proving such application or representations or the falsity thereof. If, therefore, in an action brought in our courts, the Iowa statute is to govern as to such matters of pleading and proof, the demurrer was properly sustained. So, also, if the Iowa statute be held not applicable, and the rights of the parties in this respect are to be measured by the Minnesota statute, and this latter statute is to be construed as having like legal effect with our own, the ruling was correct. Some members of the court would affirm the ruling sustaining the demurrer, on the theory that our statute pertains solely to matters of remedy and procedure, and not to the validity or substance of the contract, and therefore applies to all actions upon life insurance policies brought in this jurisdiction. Nelson v. Insurance Co., 110 Iowa, 600; 81 N. W. 807; Jones v. Insurance Co., 110 Iowa, 75, 81 N. W. 188.

We find it unnecessary, however, to now decide the question here suggested, as in our judgment the ruling of the trial court upon the demurrer may well be upheld, even on the appellant's theory that statutes of the nature of Code, § 1819, go to the substance and legal effect of the contract of insurance, rather than the remedy, and that the policy sued upon must be treated as a Minnesota contract. The statute of Minnesota pleaded and relied upon by the appellant, and above quoted requires that each policy of insurance which contains a reference to the application of the insured, "whether as a part of the policy or as having any bearing thereon," must have attached thereto a correct copy of the application. In our judgment the effect of this provision is to exclude or eliminate from the contract all reference to an application a copy of which is not attached to the policy, and to render ineffective all defenses based upon anything contained in such application. To hold otherwise is to rob the statute of all effective force and make its enactment meaningless. We are therefore disposed to hold that, if the application be not attached in obedience to the statute, the policy should be treated, construed, and en-

forced as if no written application had been made. Applying the Pennsylvania statute requiring a copy of the application to be attached to the policy, the court of that state adopted the view here expressed, and has said that where this requirement is not observed "the case is to be considered as if no such paper existed." Imperial Ins. Co. v. Dunham (Pa.) 12 Atl. 673, 2 Am. St. Rep. 686. The statute is clearly intended to protect the policy holder by requiring the company to place in his hands written evidence of the entire contract between them, and a company issuing a policy to which no copy of application is attached must be held to have thereby expressed its purpose to waive or relinquish its right to have said application considered as any part of the contract. The language of the statute is broad and imperative, and requires the attaching of the copy whenever the application is referred to either "as a part of the policy or as having any bearing thereon." The defense to which the demurrer is sustained is bottomed upon the proposition that the application was in fact referred to by the policy and made a part of the contract, and this is the very condition to which the statute is by its express terms intended to apply. If we say that the company may disregard this statute and issue its policy without attaching a copy of the application, and still have the right to assert and rely upon such application as a part of the contract, the legislative enactment is reduced to a mere idle form of words, having not the least effect upon the rights of parties as they existed before it was passed. It is the duty of the court, whenever it can be consistently done, to so construe a statute as to give it force and effect, and in such manner as to best accomplish the evident intent of the Legislature. This we think is best done by treating the Minnesota statute as in legal effect the equivalent of our own. Our attention is not directed by counsel to any decision of the courts of that state affecting the question, and we have found none. Quite in accord with the rule here applied is the case of Sands v. Insurance Co. 26 Grant's Ch. (Up. Can.) 113. * * * The statute of Ontario provides that, if the insurer prescribes contract conditions which differ or vary from those enumerated in the act, they shall be added to the policy in conspicuous type and ink of a different

color. A policy in suit had such additional matter printed in the same type as the body of the instrument and ink of a slightly different shade; but this was held not to be a compliance with the statute, and a violation of such conditions by the insured could not be set up as a defense. Such conditions were no part of the contract. See, also, Frey v. Insurance Co., 43 Up. Can. Q. B. 102; Parsons v. Insurance Co., 43 Up. Can. Q. B. 261; McIntyre v. Insurance Co., 44 Up. Can. Q. B. 501; Ulrich v. Insurance Co., 42 Up. Can. 141. It is within the unquestioned province of the state to provide the conditions upon which insurance corporations may do business, and to provide the form and scope of the contracts which they are authorized to make. It is clearly not in excess of this authority for the Legislature to enact that the entire contract between the parties, and all conditions and stipulations by which the policy may be avoided, shall be embodied in or attached to the policy delivered to the insured; and this, we think, is the manifest meaning of the enactment which requires that every policy which purports to treat the application as a part of the contract or as having any bearing thereon must have a copy thereto attached. It follows from the views we have here expressed that there was no error in sustaining the demurrer to that division of the answer pleading the alleged warranty and false representations in the application for the policy in suit.

The same objection is also fatal to the plea of false and fraudulent representations made to the applicant's medical examiner, and the demurrer thereto was also properly sustained. The medical examination was part and parcel of the application (Cooley's Briefs on the Law of Insurance, vol. 1, p. 683 [d]), and no copy thereof was attached to the policy, and for the reasons already stated defendant was not entitled to avail itself of any defense on account of matters contained therein. This conclusion does not necessarily involve any reference to section 1812 of our Code. That section is to the effect that, where the company's medical examiner approves an applicant as a fit subject for insurance, the company cannot plead or prove that the insured was not in sound health at the date of the policy issued upon such examination, unless it be shown that such certificate of health was obtained by fraud.

It may be admitted, for the purpose of this case, that the fraud pleaded was sufficient to avoid the policy if the appellant had put itself in position to make use of the defense; but, failing to attach a copy of the application to the policy, it waived its right to take issue upon the application or any part of it. Referring to the act from which the above quotation of the Minnesota statute is pleaded by the defendant, we find that it is prefaced by the declaration (section 3) that "it shall be unlawful for any company to make any contract of insurance * * * in this state * * * unless and except as authorized by the provisions of this act." The same general purpose to require the entire contract, and the representations, if any, on which it is made, to be embraced in or attached to the policy given to the insured, is found expressed in the statutes of many states. In some, as in our own, it is accompanied by the express provision that if not attached, the application or other representation shall not be pleaded or proved, while in others the general requirement for that embodiment of the entire contract in the instrument delivered to the insured is not so accompanied. For example, see Gen. St. Kan. 1901, § 3560, and Cal. Civ. Code, § 2605. The California statute here referred to provides simply that "every express warranty made at or before the execution of the policy must be contained in the policy itself or in another instrument signed by the insured and referred to in the policy as making part of it." In Kentucky the statute is that no insurance company "shall make any contract of insurance or agreement as to such contract other than is plainly expressed in the policy issued thereon." Ky. St. 1903, § 656. In no state where any such statute is found, whether accompanied or unaccompanied by an express provision excluding proof of false representation of warranty not contained in or attached to the policy, have we been able to find a decision or suggestion by any court that a company failing to attach or embody the application in its policy when required by statute may make such omitted matter a basis of defense to an action on the contract. On the other hand, in every state where occasion has arisen to consider it, the holding has been to the contrary. Insurance Co. v.

Bank (Kan. Sup.) 29 Pac. 576; Insurance Co. v. Bank (Kan. Sup.) 29 Pac. 578; National Life Ass'n v. Berkley, (Va.) 34 S. E. 469.

As we have already suggested, it is within the power of the Legislature not only to impose conditions upon the right of insurance corporations to do business in the state, but to regulate the form and substance of all insurance contracts, and prescribe what conditions may or may not be imposed upon the insured. When, therefore, it is enacted that all representations and warranties upon which the company proposes to rely or insist shall be attached to or embodied in the policy, the state is not exceeding its recognized authority, and the company failing to comply with the provision must be conclusively held to have elected to rely upon the contract as contained in such policy without reference to any representation or warranty not contained in that instrument. The denial of the right to plead or prove such extrinsic matter is not in any proper sense a "penalty" for failing to comply with the statute, for the company has a perfect right to waive or forego any advantage it could derive from an embodiment of the application in the policy. It issues its policy with the statute in view, and, failing to do that which by the terms of the statute is necessary to allow the application to have "any bearing" on the rights of the parties, the contract stands as if the omitted writings never existed.

It is suggested in the argument for appellant that the effect of the Minnesota statute is a question not raised by the record made in the court below. The objection is not well taken. The answer expressly pleads the laws and the statutes of Minnesota, which it claims entered into the contract of insurance and vested the insurer with the right to rely upon the defense of fraud, misrepresentation, and breach of warranty. This plea makes it both proper and necessary for the court to inquire and determine whether the matters alleged have the effect claimed for them. And even if the ruling upon the demurrer was influenced alone by the view of the trial court as to the effect of the Iowa statute, still, if an application of the Minnesota statute pleaded by

the appellant would necessarily lead to the same result, the ruling would not be disturbed. Jamison v. Perry, 38 Iowa, 14; Grossman's Estate, 175 Ill. 425, 51 N. E. 750, 67 Am. St. Rep. 219.

3. It is also argued that, under all the evidence in the case, the court should have held, as a matter of law, that plaintiff was bound by the release given by the special administratrix, and could not recover upon the policy. Assuming, for the present, that Mary Rauen, as special administratrix, had the legal right and authority to receive and receipt for the moneys, if any, due to the estate of her husband on the policy in suit, let us inquire as to the effect of the alleged release. That one who has made a written surrender of a valuable right, or release of a subsisting cause of action, may repudiate the same upon sufficient showing of fraud or mistake, even where the demand thus released is disputed and unliquidated, is too well established to admit of controversy. * * * The mistake which will avoid a release is not necessarily a mistake of fact, but there are frequent instances in which a mistake of law or the legal effect of the written instrument has been held sufficient ground for its repudiation. * * *

If, then, the defendant represented to Mrs. Rauen that the policy was void or voidable because of false statements or warranties in the application, when in truth, as we here held, no such defense to her claim existed, and that the plaintiff, relying upon such representations, released the right of action on the policy for a merely nominal consideration (and this is the substance of defendant's own showing), we have a case in which the findings of fraud or mistake cannot be set aside as without support in the evidence. In Berry v. Insurance Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548, the plaintiff was the holder of a policy of fire insurance upon which a loss had occurred. The adjuster for the company represented to the insured that, by reason of an alleged violation of the conditions of the policy (objections which had, in fact, been waived), the company was not liable thereon, and thus induced the insured to accept materially less than he was entitled to recover. There was no showing

that the adjuster acted in bad faith, but the court, after recognizing the general rule that a mistake of law will not avoid a contract, says: "But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss, and by falsely representing that under the law applicable to the case the policy was void it induced plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim. This clearly constituted fraud, and there would be manifest injustice in upholding a settlement under such circumstances."

A similar proposition is affirmed in Tabor v. Insurance Co. (Mich.) 6 N. W. 830, and in Insurance Co. v. Bowes, 42 Mich. 19, 51 N. W. 962. In Henry v. Imperial Council (N. J. Ch.) 29 Atl. 508, the plaintiff's husband died holding benefit certificates issued by the defendant to the amount of $3,000. Upon the claim by the defendant that the deceased was not in good standing in the council at the time of his death, plaintiff was induced to accept $500 and execute a release of all her claims upon the certificates. Upon a showing that the claim made by the defendant was not true to fact, the settlement was held fraudulent and void, although plaintiff, before accepting the compromise, had the assistance of counsel. * * * The Kentucky court has said that when it is "perfectly evident that the only consideration of a contract is a mistake as to the legal rights of the parties, and when there has been no fair compromise of bona fide and doubtful claims, we do not doubt that the agreement may be avoided on the ground of a clear mistake of law and a total want, therefore, of consideration or mutuality." Underwood v. Brockman, 4 Dana, 309, 29 Am. Dec. 407; Belt v. Insurance Co. (N. Y.) 43 N. E. 64; Rued v. Cooper (Cal.) 51 Pac. 704.

It is inconceivable that in the case at bar the special administratrix could have surrendered the interests of the estate in a policy of $1,000 against which no valid defense has been shown, except under a clear misapprehension of its validity, or of the meaning of and effect of the paper signed

by her. A grossly inadequate consideration for the release of valuable rights has been held to be in itself an evidence of fraud. Toomey v. Whitney (Sup.) 88 N. Y. Supp. 216; Railroad Co. v. Shuford (Tex. Civ. App.) 81 S. W. 1189; Russell v. Railroad Co., 109 Tenn. 43, 70 S. W. 1; Staples v. Wellington, 62 Me. 9. A specific intent to defraud need not in all cases be established in order to avoid a release, where the person executing it has in fact been misled as to its meaning and effect. Conner v. Dundee (N. J.) 17 Atl. 975; O'Donnell v. Clinton, 145 Mass. 461, 14 N. E. 747; Warder v. Tucker, 7 Mass. 449, 5 Am. Dec. 62. It is further to be remembered that if, as contended by the appellant, the rights of the parties in respect to matters involved in this controversy are governed by the laws of Minnesota, then a misrepresentation to or a mistake by the special administratrix in respect to those rights is to be considered as a misrepresentation or mistake of fact, and not of law. The rule by which a party is presumed to know the law has no reference to the law of another state or country. Schneider v. Schneider, 125 Iowa, 15, 98 N. W. 159. * * *

But there is another rule of law which is pertinent to this issue. The appellee avers and insists that the release pleaded by the appellant, even if made by a person of competent authority, is without consideration. The policy in suit represents a liquidated demand in appellee's favor. If, upon the death of the insured, his representatives became entitled to recover anything upon this demand, it was $1,000; neither more nor less. It is an ancient doctrine of the common law, often approved and applied by this court, that an agreement to release or discharge a liquidated enforceable debt on payment of less than the amount due is not supported by a consideration and will not defeat an action to recover the unpaid remainder. Eldred v. Petterson, 80 Iowa, 264, 45 N. W. 755, 20 Am. St. Rep. 416; Bender v. Been, 78 Iowa, 283, 43 N. W. 216, 5 L. R. A. 596; Works v. Hershey, 35 Iowa, 340; Rea v. Owens, 37 Iowa, 262; Myers v. Byington, 34 Iowa, 205.

An exception is found to this rule when the creditor's claim is of a doubtful character, or is the subject of a bona fide dispute

or controversy, and the part payment in discharge of the whole is made pursuant to an agreement of settlement or compromise, or where the agreement is made and carried out pending actual litigation. But this exception is not available to the debtor, where no defense to the claim exists, and the circumstances are such that the debtor securing the compromise must be presumed to know that he is legally liable for the full face of the demand. In other words, if by alleging and claiming a defense which does not exist, or by representations of fact which are not true, the debtor induces his creditor to accept less than is justly due him in satisfaction of the entire debt, the release so secured is of no avail to defend an action by the creditor. This well-established rule has often been applied to cases where an insurance company, by claiming a defense which does not in fact exist, obtains a settlement of the policy holder's claim and surrender of the policy for less than is due thereon. Quite in point is the case of Insurance Co. v. Wickham, 141 U. S. 564, 12 Sup. Ct. 84, 35 L. Ed. 860. In that case the policy holder claimed a certain sum for injury to an insured vessel which had been partially burned and sunk and an additional sum for expenses incurred in raising the hull. Upon payment of the first item, he made and delivered to the company a release in full, declaring that "in consideration of said payment said policy is hereby canceled and surrendered to said company, and all further claims by virtue of said policy forever waived." Five other policies in as many different companies covering the same loss were on the same day surrendered to the insurers, with releases similar to the one above quoted from. Later the plaintiff brought an action at law upon the policies to recover the remainder of his claim, and from judgment in his favor an appeal was taken to the Supreme Court of the United States, by which the finding was affirmed under the rule to which we have adverted, that payment of a part of a just debt affords no consideration for the release of the remainder. The court, by Mr. Justice Brown, says that: "if the plaintiffs were induced to settle their claims for one half the amount that was due them, and there was no consideration for the relinquish-

ment of the other half, this suit will lie for the recovery of the amount. The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise, and payment of a certain sum is a satisfaction of the entire claim; but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered a compromise, but will be treated as without consideration and void."

* * * * * * * * * *

It is clear, therefore, that, the appellee's claims upon the policy being a liquidated demand, the release thereof by the special administratrix for a merely nominal sum can be sustained only on the theory that it was a compromise of a doubtful claim or of a bona fide dispute as to the rights of the parties. From what we have said in the preceding paragraphs of this opinion, it cannot be held as a matter of law that appellee's claim was of a doubtful character; and whether the refusal to pay and the assertion of a defense by which the release was induced were bona fide, or were advanced for the more purpose of securing an advantageous settlement, was a question of fact for the trial court or jury to determine. "To support a compromise there should be a doubtful bona fide claim, about which the parties stand on equal footing as to knowledge or ignorance of facts, and in settling it there should be no imposition or deceit. That is no compromise where one knows that he has no claim, but deceives the other into believing he has one. It is mutual concession or the common risk in the event, which supports a compromise. If one has no claim, and he knows it, he is not conceding in a compromise. He is cheating. He has nothing to concede, and his only chance in the doubtful issue is that his fraud may possibly fail." Anthony v. Boyd, supra; Ness v. Minnesota Co. (Minn.) 92

N. W. 333; De Mars v. Musser (Minn.) 35 N. W. 1. Moreover, it must not be overlooked that this case was tried below as an action at law, and the finding of the court upon the facts comes to us with the force and effect of a verdict of a jury.

4. But there is another phase of this case which must be considered. The settlement or compromise relied upon by the appelant was had, as we have seen, with the special administratrix of the estate, and before the will was admitted to probate. It appears that in this transaction she acted without any special order or authority granted by the court, and that her acts therein were never reported to or approved by the court. The appellee, among other objections to said settlement makes the point that a special administratrix has not, by virtue of an appointment as such, any power to bind the estate by a compromise and release of a valid claim. Our statute provides that when "from any cause general administration or probate of a will cannot be immediately granted, one or more special administrators may be appointed to collect and preserve the property of the deceased." Code, § 3299. It is further provided that they shall make and file an inventory, and shall preserve the property from injury, but shall take no steps in relation to allowance of claims against the estate. Upon the granting of full administration the powers of the special administrator cease, and all the business is to be transferred to the general executor or administrator. Code, § 3300. It will be observed, from the language of the statute referred to, that the powers of a special administrator are of a special and limited character. Recognizing this fact, we have held that his appointment is not sufficient to set in motion the statute of limitations against the claims of creditors. (Pickering v. Weiting, 47 Iowa, 212); that the court has no authority to order the sale of real estate on his petition, and that sale made under an order so procured is absolutely void (Long v. Burnett, 13 Iowa, 28, 81 Am. Dec. 420); and that he has no power to submit a claim against the estate to arbitration (Sullivan v. Nicoulin, 113 Iowa, 76, 84 N. W. 978). Even as to general administrators the power to compromise with

a debtor of the estate is expressly made subject to the approval of the court. Code, § 3318. In the Sullivan Case we said of the powers of a special administrator that "he is simply to collect and preserve the property of the deceased, and for this purpose may do all needful acts under the direction of the court." In that case the special administrator submitted to arbitration a claim in favor of the estate against which the debtor had set up a counterclaim. This, we said, was without authority of law, and constituted no defense to an action after brought upon the claim by the general administrator against the debtor. If that decision announces a correct rule, there seems to be no way to escape the conclusion that a compromise made by a special administratrix pending probate of the will, without the authority of approval of the court, releasing a valuable right of the estate for a mere nominal consideration, is not a sufficient answer to an action brought by the executor after the will has been duly probated. In Long v. Burnett, supra, the court emphasizes the limited power of the special administrator, saying: "His functions are limited to a few prescribed duties in relation to the preservation of the personal assets, and these cease as soon as a regular administrator is appointed. He cannot be sued. The statute of limitation does not run against creditors during the period of his agency. He is simply an agent and not an administrator. He has no power to settle the estate." Bearing on the same point, see Larson v. Johnson (Minn.) 75 N. W. 699; McAlpine v. Kratka (Minn.) 100 N. W. 233. The statute itself is not of doubtful construction, and, when read in the light of our cases above cited, leaves no room for any other result than we have already suggested, that the special administratrix of the estate of Matthias Rauen was without power as such to enter into any compromise of the claim upon the policy.

It is very earnestly urged by the appellant that even if this be technically true, Mary Rauen was in fact the sole beneficiary of the policy, and for this reason, if no other, the settlement with her may and should be upheld. Whether the debtor of an estate may secure a release from the beneficiary under the will of the deceased and thereby bar an

action by the administrator we need not now determine, for if such recourse be available under any circumstances we think this case is not within that rule. It is not shown by the present record that Mary Rauen is the sole beneficiary under the policy. The indemnity there provided is expressly made payable to the executors of the insured. By Code, § 3313, such moneys are to be "disposed of like other property left by the deceased," and by section 1805 they "inure to the separate benefit of his wife and children." It is clear, from these provisions, that the widow is not the only person interested in the collection of the policy, and therefore the executor cannot be estopped or concluded by her act in attempting to release the claim, unless we concede the appellant's theory that the effect of the will is to vest her with that right. But this we cannot concede. In the first place, it does not appear whether the widow had then or has yet exercised her election to take under the will or under the statute of descent and distribution. If she shall elect to take under the statute, her right to the proceeds of the policy will not be exclusive, while, if she takes under the will, she takes the personal property including the insurance policy or its proceeds charged with the debts of the estate. It is true the avails of life insurance are not, by law, subject to the payment of debts, but, if the insured had the right to dispose of the proceeds of the policy by his will, he had the right to charge the bequest with conditions, and this he expressly did. It follows that in no event disclosed by the record can the executor be barred by the act of the widow from his right to collect the claim upon the policy and apply the avails as provided by law or by the terms of the will.

We find no error in the record requiring a reversal, and the judgment of the district court is affirmed.

Accord. Tyler v. O. F. Rel. Ass'n, (Mass.) 13 N. E. 360; Sanford v. Ins. Co., 11 Wash. 653, 40 Pa. 609; McLean v. Equitable, 100 Ind. 127, 50 Am. Rep. 779; Ins. Co. v. Villeneuve, 25 Tex. Civ. App. 360, 60 S. W. 1014; Burk v. Putnam, 113 Iowa 234, 84 N. W. 1053.

CHAPTER V.

AGENTS.

PEOPLE v. PEOPLE'S INS. EXCH.

Supreme Court of Illinois. 1888. 126 Ill. 466, 18 N. E. 774.

Agents of Unauthorized Companies—Penalties.

Craig, C. J. This was an action of debt, brought in the name of the people against the People's Insurance Exchange, to recover penalties provided by section 22 of the act of March 11, 1869, entitled "An act to incorporate and to govern fire, marine, and inland navigation insurance companies." After the evidence had all been introduced, the court instructed the jury that under the evidence their verdict must be for the defndant; and the giving of this instruction is assigned as error. It is conceded that in a proper case the jury may be instructed to find for the defendant, but in this case it is contended that there was evidence introduced which tended to prove plaintiff's cause of action, and that it was the duty of the court to allow the jury to pass upon the evidence, under proper instructions from the court. In Simmons v. Railroad Co., 110 Ill. 344, where the court excluded all of plaintiff's evidence, and directed the jury to find for the defendant, it is said: "There may be decisions to be found which hold that if there is any evidence, even a scintilla, tending to support the plaintiff's case, it must be submitted to the jury. But we think the more reasonable rule, which has now come to be established by the better authority, is that, when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound

to submit the case to the jury, but may direct a verdict for the defendant." In Frazer v. Howe, 106 Ill. 573, in speaking with reference to the practice of withdrawing the evidence from the jury, or directing the jury to find for the defendant, it is said: "If there is no evidence before the jury on a material issue in favor of the party holding the affirmative of that issue, in which the jury could, in the eye of the law, reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative; but when there is such evidence before the jury it must be left to them to determine its weight and effect." Under the rule announced in the cases cited, if the evidence introduced on the trial reasonably tended to prove the plaintiff's cause of action, the instruction was erroneous. We are not here called upon to determine whether the evidence was sufficient to entitle plaintiff to recover, or the weight to be given to the evidence, but we will look to the evidence for the purpose of determining whether it fairly tended to establish plaintiff's cause of action, and, if it did, then the court erred in taking it from the jury by the instruction."

Section 22 of the act of 1869 provides: "It shall not be lawful for any insurance company * * * organized under the laws of any other state of the United States, or any foreign government, for any of the purposes specified in this act, directly or indirectly to take risks or transact any business of insurance in this state, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid, by any agent or agents, in this state, shall first appoint an attorney in this state on whom process of law can be served, and file in the office of the auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment," etc. "Nor shall it be lawful for any agent or agents to act for any company or companies referred to in this section, directly or indirectly, in taking risks or transacting the business of fire or inland navigation insurance in this state, without procuring from the auditor of public accounts a certificate of authority, stating that such company has complied with all the requisitions of this act which apply

to such companies, and the name of the attorney appointed to act for the company. * * * Any violation of any of the provisions of this act shall subject the party violating the same to a penalty of $500 for each violation. * * * The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." The appellee, the People's Insurance Exchange, is a corporation organized under the general law in relation to corporations, approved April 18, 1872. The object of the corporation, as stated in the articles of association, are "to afford the public an 'exchange,' where the most reliable information can always be had on all matters relating to insurance of every kind,—life, fire, marine, inland, accident, or otherwise,—and a responsible agency for parties seeking insurance or skill and experience necessary in the proper adjustment of losses, preparation of claims, or prosecution of suits at law in insurance cases." The evidence shows that defendant had an office in the city of Chicago, and was engaged in soliciting and procuring insurance, delivering the policies, and collecting the premiums; that it secured insurance for James Turner in five different insurance companies organized in other states, which were not authorized to do business in the state of Illinois. The defendant also, as appeared from the evidence, procured insurance for various other parties in insurance companies doing business in other states, which were not allowed to transact the business of insurance in this state. But it is claimed as a defense to the action that the defendant corporation, in procuring the insurance, collecting the premiums, and delivering the policies, was acting as agent of the insured, and not as agent of the insurance companies, and that it is not liable for the penalties named in the statute, although the insurance companies issuing policies of insurance were not authorized to transact business in this state; and in support of this position attention is called to the fact that at the beginning of business with any one of the foreign insurance companies a circular was sent to such company as follows:

"Dear Sir: The laws of the state are considered quite stringent, and provide pains and penalties quite severe for any one acting directly or indirectly as agent for any insurance company not duly authorized to do business in this state. There is no question about the right of any individual to procure his own insurance where he pleases, and no law can be enacted by any state abridging that right; so in all cases where we send you application for insurance on property in Illinois, we wish to have it distinctly understood by you, as we have it understood by the assured, that we are the agents and representatives of the assured only, and we would request that in all cases you forward your bills for premiums to us, made out in the name of the assured, with the commission deducted by way of rebate to assured, namely: 'John Jones, Dr., To———Insurance Company, of ———. Policy number,———. Property ———. For ———. Premium, ———. Less Rebate,——. Net balance due, ———.' This will make the matter right at both ends of the line, and will clearly establish the fact between all parties concerned that we are acting only for the assured, as their agent and attorney in the matter.

"Very respectfully, W. L. Caldwell, Treasurer and Secretary."

In addition to the above, before procuring a policy of insurance, the defendant corporation required the insured to execute a power of attorney as follows: "Know all men by these presents, that the People's Insurance Exchange, of Chicago, Illinois, is hereby appointed our agent and attorney to procure for us insurance as follows, viz.: $——— on ———, as per forms approved and authorized by us. And it is agreed that for all such insurance placed in companies duly authorized to do business in the state of Illinois, when the policies are accepted by us, premium at the rate of —— per cent. shall be paid; for all insurance placed in companies not duly authorized to do business in the state of Illinois, when policy is accepted by us, a premium at the rate of —— per cent. shall be paid. It is further agreed that all difference in premium by reduction of the above rate, or any rebate, brokerage, or commission that said People's Insurance Exchange may be able to secure for us, shall be paid to them, and the same shall be in full for all

compensation as services rendered as agents aforesaid.' Witness our hands and seals," etc. In the argument much importance is attached to these documents by counsel for appellee. He says: "The evidence in this case clearly shows that every act done by the appellee was under specific and definite authority, and instruction by written power of attorney to act for and in behalf of the assured." If the decision of the question involved rested solely upon the two documents referred to, there might be much force in the argument, but such is not the case. The various acts of the defendant corporation, in the procuring of the insurance were proper matters for the consideration of the jury, in connection with the power of attorney, for the purpose of determining whether the corporation was acting in good faith, as agent of the insured, solely under the power of attorney, or whether the execution of that paper was obtained as a mere cover to conceal the true relation in which the corporation was acting. It appears from the evidence that the insurance was solicited by the defendant corporation. The policies were issued upon the representation of its officers; the insurance companies relying solely upon their statements as to the condition and situation of the property to be insured. The policies were sent by mail to the defendant. It took charge of them, and delivered them to the insured, collected the premium, and remitted the same to the insurance companies, deducting commissions. In certain cases policies were sent to the defendant corporation, and its officers submitted them to the insured, for their examination and acceptance, or rejection. If they should be accepted, the amount of insurance would be paid over to the defendant; if rejected, defendant returned the policies to the insurance companies. Were all these acts done as agent for the persons who desired insurance, or were they done in different capacity? We think the question was one for the jury, upon due consideration of all the evidence. In order to make out a case, the plaintiff was not required to establish the fact that the defendant was the agent for the foreign insurance companies, in the sense the term "agent" is ordinarily used, as seems to be supposed by counsel for appellee in his argument. The act under which the action was instituted has an important bearing on this ques-

tion. It says: "The term 'agent or agents,' used in this section, shall include an acknowledged agent, surveyor, broker, or any other person or persons who shall in any manner aid in transacting the insurance business of any insurance company not incorporated by the laws of this state." Suppose the defendant corporation was not the agent of the foreign insurance companies, in the ordinary sense of that term, still, if it in any manner aided these companies in the transaction of the business, it will, within the meaning of the act, be liable. Pierce v. People, 106 Ill. 18. Whether, therefore, the defendant corporation had in any manner aided in transacting the insurance business in which the foreign insurance companies were engaged, was a question for the jury, under all the evidence, and that question of fact should not have been taken from the jury by the instruction of the court. The judgment of the superior court will be reversed, and the cause remanded.

Note. In some states the agent is held liable to the insured for the amount of loss, if his principal was not authorized to do business in that state. Bartlett v. Rosschild, 214 Pa. St. 421, 63 Atl. 1030; Price v. Garvin, 69 S. W. (Tex.) 985.

Note. The statute of Missouri provides that the agent must hold a copy of the certificate authorizing the company to do business. It has therefore been held that the agent is not personally liable for misrepresenting the fact of the company's being admitted. Jones v. Horn, 104 Mo. App., 705, 78 S. W. 638.

LINDSAY v. PETTIGREW.

Supreme Court of South Dakota. July 17, 1894. 5 South Dakota 500. 59 N. W. 726.

Agreement to Procure Insurance.

Fuller, J. On the 30th day of September, 1885, and for more than two years thereafter, plaintiff and appellant was the owner of a certain tract of land, on which was situated a frame house worth about $300. On the above-mentioned date, one Nellie D. Pettigrew, through her brother, the de-

fendant and respondent, took a mortgage on said premises to secure a loan for $600. As a part of the transaction, and as a further security, respondent, who was an insurance agent or broker, required appellant to deduct $5 from the proceeds of the loan, as payment for a $250 fire insurance policy, which respondent agreed to secure or effect on said premises for a term of five years, and to make payable, in case of loss, to his sister, the mortgagee, as her interest might appear, and to appellant in case a loss occurred during the life of the policy, after the mortgage indebtedness had been satisfied. Respondent failed to procure or effect the insurance, and on the 6th day of January, 1886, the house, valued at $300, was totally destroyed by fire. Plaintiff paid the indebtedness secured by the mortgage, and instituted this suit against defendant to recover the amount for which he agreed to have the house insured. Upon the foregoing state of facts, which were undisputed, the court directed a verdict and entered judgment in favor of the defendant, and plaintiff appeals.

It is urged by counsel for respondent that the complaint fails to allege that plaintiff was the owner of the property at the date of its destruction by fire, or that he had at that time an insurable interest therein, and that said complaint does not, therefore, state facts sufficient to constitute a cause of action. The complaint states that plaintiff was at the time he procured defendant to effect the insurance, and now is, the owner of the property; and plaintiff also testified at the trial that he was the owner of the property on the day the defendant received from him the $5, and agreed to have the property insured, and that he continued to own said property for more than two years thereafter, and that the house was destroyed in about three months after the parties entered into this agreement, and that he was damaged thereby in the sum of $300. While the allegations as to ownership at the time of the loss might have been more specifically stated, the evidence upon that subject—which is undisputed, and was admitted without objection—clearly settles the question, and there is no merit in respondent's contention.

Counsel for respondent maintain, in support of the judgment, that, if the complaint alleges and the evidence establishes a cause of action in favor of appellant, it is against some insurance company, for which respondent was acting as agent, and not against the respondent personally; and to this proposition we will direct our attention. It appears that respondent was engaged in the insurance business, as agent for numerous companies; but, as no particular company was mentioned as the one in which appellant's property was to be insured, it is quite evident that no company is liable, and, unless a cause of action exists against respondent, appellant is without a remedy, and the judgment must be sustained. Where an agent, failing to disclose his principal, enters into a contract of such a character and in such a manner that it can be made effectual only by making the agent liable for a breach thereof, such agent will be personally bound, unless a different intention clearly appears from the terms of such contract; and under the circumstances of this case, if it should appear that respondent was the agent of numerous insurance companies, and not the agent of appellant in the transaction under consideration, that fact might not be sufficient to relieve him from a personal liability. 1 Am. & Eng. Enc. Law, 406, and cases cited. Respondent's object in requiring appellant to insure the house was to increase the security for the loan, and at the same time enable him to procure the usual commission or compensation connected with a transaction of that character. The money was paid, and the arrangement was consummated by which the insurance was to be procured, without any intimation as to the company in which the same was to be placed; and we are disposed to regard the relation existing between appellant and respondent as that of principal and agent, and to hold that an agent who takes his principal's money under an express agreement to procure insurance, and unjustifiably fails to secure the same or make an effort in that direction, thereby assumes the risk, and becomes liable, in case of loss, to pay as much of the same as would have been covered by the insurance policy

for which his principal had paid, provided the same had been procured as directed. Mechem, Ag. 475; 3 Suth. Dam. 9; Perkins v. Insurance Co., 4 Cow. 645; Thorne v. Deas, 4 Johns. 84; Shoenfeld v. Fleisher, 73 Ill. 404; Beardsley v. Davis, 52 Barb. 159; Gray v. Murray, 3 Johns. Ch. 169; Morris v. Summerl, 2 Wash. C. C. 203, Fed. Cas. 9,837. Appellant did all that was necessary, and all that he was required to do, towards securing the insurance for which he had paid in full. He had a right to rely, and did rely, upon respondent to do that which he had promised and agreed to perform; and after the loss had occurred, and when he applied to respondent to have the same adjusted, he learned for the first time that the property had not been insured. The law of this case, applied to the facts before us, imposes upon respondent a liability; and the judgment is reversed, and the case is remanded for a new trial.

Accord. Hurrull v. Bullard, 3 Fost., etc., F. 445; Smith v. Binder, 75 Ill. 492; Stadler v. Trever, 86 Wis. 42, 56 N. W. 187; Shoenfeld v. Fleisher, 73 Ill. 404; Beardsley v. Davis, 52 Barb. (N. Y.) 159.

HALSEY et al. v. ADAMS et al.

Court of Errors and Appeals of New Jersey. June 28, 1899.
63 New Jersey Law 330. 43 Atl. 708.

Liability of Agents—Failure to Obey Instructions.

Nixon, J. All the material facts in the record before us are undisputed. The plaintiffs in error were formerly associated in the business of underwriting policies of insurance under the title of Manufacturers' & Merchants' Fire Association of New Jersey upon the Lloyd's plan, as authorized by the act of the legislature of this state approved March 25, 1895 (2 Gen. St. p. 1784). In the prose-

cution of their business, agents were appointed in different parts of the state, and among them were the defendants in error, Israel G. Adams & Co., of Atlantic City. Through these agents a fire insurance policy was issued to the Citizens' Ice & Cold-Storage Company for $3,500. After this policy had been in force about a month, the general managers of the insurance company, by letter, directed the agents to reduce the amount of the policy to $1,500. Through the neglect of an employe of the agents, this letter never reached them, and the instructions were not complied with, nor was any effort made to reduce the amount when the fire occurred which resulted in a loss to the plaintiffs of $2,038.69. Suit was brought in the supreme court to recover $1,164.96, the difference between the sum actually paid and that which would have been paid had the policy been reduced as directed. The case was tried before the circuit judge in Essex county, who directed a verdict for the defendants, and the judgment thereupon entered is by this writ brought here for review.

The questions presented by the exceptions grow out of the relations between the insurers and their agents. The policy itself, as the record shows, has fulfilled its function as a contract between the company and the insured, all the claims under it having been paid; and no question is here raised as to the rights of the insured. The policy itself appears in this case only in the character of an exhibit, to throw light incidentally upon the mutual relations of the respective parties to the present controversy. The business of the plaintiffs in error, as the proofs show, was conducted almost exclusively by their general managers, Adams, Lockwood & Forman, partners. As required by the statute under which the company was organized, Charles W. McMurran had been appointed their attorney in fact. but it does not appear that he performed any duties in the active management of the business. It was affirmatively proved, and not in any way controverted, that Adams, Lockwood & Foreman were "managers for the United States," their duties being "to accept business and regulate the policy of the company, what lines they should write, and

to settle all losses," and, as stated in answer to a question by the court, "to dictate the policy, such lines as they should carry at such rates, issue authority to agents, to receive money or pay." In the exercise of these powers, they issued the following commission to Adams & Co., the defendants in error: "Manufacturers' and Merchants' Fire Association of New Jersey, 188 Market St., Newark, N. J. Newark, October 1st, 1897. Be it known that Israel G. Adams & Co., of Atlantic City, in the county of Atlantic, and state of New Jersey, are appointed and by these presents duly constituted agents of the Manufacturers' and Merchants' Fire Association of Newark, N. J., with full power to receive proposals for insurance against loss or damage by fire in Atlantic City, N. J., and vicinity, to fix rates of premium, to receive moneys, and to countersign, issue, renew, and consent to the transfer of policies of insurance, subject to the rules and regulations of said association, and to such instructions as may from time to time be given. The power hereby conferred may be revoked at any time the association may so elect. In witness whereof, the Manufacturers' and Merchants' Fire Association have caused these presents to be signed by its duly-appointed managers in the city of Newark, N. J., this first day of October, 1897. Adams, Lockwood & Forman, Managers." These agents afterwards, in the usual course of their business, on October 7, 1897, issued policy No. 51,408 to the ice and cold-storage company for $3,500. On the 3d of November, 1897, the general managers instructed the agents to reduce the policy to $1,500, by a letter, from which we quote what relates to this matter, to wit: "Manufacturers' and Merchants' Fire Association of New Jersey, 188 Market St., Newark, N. J. Charles W. McMurran, Attorney for the Underwriters. Adams, Lockwood & Forman, Managers. Telephone 797, Newark. Newark, November 3d, 1898. I. G. Adams, Atlantic City, New Jersey: * * * With reference to policy No. 51,408,—Citizens' Ice & Cold-Storage Co.,—after looking over the list of companies, and the amounts carried, we think our line is too large, and must ask you to reduce it to

$1,500. In case of loss we do not care to have the Manufacturers' & Merchants' Fire Association quoted on the risk for $3,500, when all the large stock companies are writing but $1,250 and $1,500 apiece. Yours, truly, Adams. Lockwood & Forman, Managers."

The well-established general rule of law that an agent is bound to carry out the instructions of his principal, and must respond for losses that occur in consequence of his failure to do so, was clearly stated by the learned trial judge in his charge. The material exceptions taken were to the refusal of the court to admit certain questions put by counsel for the plaintiff, the first being, "What, by the custom of the trade, is the duty of an agent when instructed to reduce the amount of a policy?" This question was asked John S. Lockwood, one of the general managers, and, being objected to, was overruled. The ground for overruling this question, briefly stated, as it appears from the record, was the absence of any condition in the policy itself providing for a reduction of its amount, and therefore the only remedy for the insuring company, if dissatisfied with its contract, was to order its cancellation on paying a rebate of premium in the manner prescribed by the terms of the policy; and that the instructions given in the letter to the agents could not be carried out, and were inconsistent with the rights of the party insured: and that the evidence proposed would, in effect, vary the terms of the policy. We think there was error in this ruling. By its express terms the question was only an offer to show that some duty devolved upon an agent who received instructions to reduce a policy, and what, according to the custom of the business or trade, that duty was. The object was to affirmatively prove that the word "reduce," as used, has a definite and well-understood meaning among those engaged in the fire insurance business. Its purport was not to relieve any one from doing what he was bound to do by the terms of any contract, nor to show that either party should not carry out fully every promise or undertaking in this policy of insurance, which was done after the fire; and the cold-storage company.

whose property was insured, is not a party to this suit in any way. It was not, and of course could not be, contended that a fire insurance company must carry until the policy expires what it deems to be an excessive risk, and it is equally true that, with the consent of the insured, the amount carried may be reduced to any sum satisfactory to both parties, and there is nothing in the record from which the presumption arises that the consent of the insured could not have been obtained to a reduction to the sum desired, no effort to that end having been made. There is no room to doubt the true meaning of the letter, and there is no suggestion that the agents did not understand that the plaintiffs were unwilling to carry an insurance of $3,500 for the cold-storage company. The evidence proposed by the question overruled was to show that the word "reduce," as used in the letter, has a special and technical meaning according to the customs of the fire insurance business, and thus was a trade term, and clearly indicated to the defendants, who were fire insurance agents of large experience, what steps should be taken to relieve plaintiffs from the excessive amount. The ruling of the court denied any such meaning to the word in the present case. That parol evidence is competent to prove the special or trade meaning of words has long been settled. The rule established by a multitude of cases is stated in 1 Greenl. Ev. § 295, as follows: "In regard to words which are purely technical or local,—that is, words which are not of universal use, but are familiarly known and employed, either in a particular district, or in a particular science or trade,—parol evidence is always receivable to define and explain their meaning among those who use them. And the principle and practice are the same in regard to words which have two meanings, the one common and universal and the other technical, peculiar, or local; parol evidence being admissible of facts tending to show that the words were used in the latter sense, and to ascertain their technical or local meaning." Now, is the word "reduce," as used in the instructions given, such as to bring it within the operation of the fore-

going rule? We think it is. There are but few words in our language that have so many technical meanings as this one. In the medical profession instructions to reduce a fracture would mean one thing; in the military world, to reduce a fort, quite another; to the mathematician, to reduce a problem, another; to the chemist, to reduce a substance, still another; and so on. But in each case it would be competent to show by parol evidence, if any exigency required it, just what the words "to reduce" meant in the connection in which they were used, and that they clearly implied to any one in the business or trade in which the instructions were given just what means should be used and steps taken to accomplish the purpose intended. Therefore, when the offer was made to prove by parol evidence that in the fire insurance business this elastic verb "to reduce," as used in the letter which is the foundation of this suit, has a well-known technical and special meaning, this testimony should not have been excluded from the jury, whose duty it would be to determine what weight it should have in the case. The fact that the actual meaning of a trade term is a question for the jury is not in conflict with the general rule that it is the duty of the court to construe written instruments. In Goddard v. Foster, 17 Wall. 123-142, the court said: "The rule of law that the interpretation of written instruments is a question of law for the court is applied in full force to agreements to be deduced from the correspondence of the parties, and the fact that the language of the letters containing the offer or acceptance is doubtful does not relieve the court of this duty, or make the question one of fact for the jury. It is only where terms are technical, or terms having a peculiar meaning in a particular trade or place, that the aid of a jury is invoked to ascertain their meaning."

Another exception was taken because the trial judge overruled the following question: "Now, in answer to a question put by Judge Thompson that it was the custom that agents should reduce the amount of policies, let me ask you what an instruction to reduce would require an

agent to do in case he could not make an agreement with the insured for a reduction of the policy?" After the question previously considered had been overruled, the propriety of putting this one to the same witness can be determined only by ascertaining whether the cross-examination of the witness by the defendants' counsel reopened the question as to the agent's duty upon receiving instructions to reduce the policy. The evidence thus elicited was as follows: "Q. Did you expect the agent to reduce that policy on the face of it; that is, the original policy in the hands of the cold-storage company? A. We expected him either to reduce it by indorsing the policy, or issuing a new policy, which was the custom of the business. Q. Was there any way by which he could reduce that policy? A. Certainly. It is done thousands of times during the year. Q. How? A. By sending notice to the insured to reduce that policy, as the company has ordered it reduced, and rewrite the policy. Q. Then you would rewrite the policy? A. Or reduce by indorsement. Q. Do you ever reduce by indorsement? A. Yes, sir. Q. Was that the custom of your company? A. Yes, and all others throughout the United States. Q. And you permitted agents to reduce policies without any reference to you? A. Yes, sir; we ordered him to do so." Now, this cross-examination seems to have opened up anew the whole field of inquiry from which the plaintiff had been excluded by the previous ruling. The right of the plaintiff to cross-examine upon all new matters thus brought into the case is well established. 8 Enc. Pl. & Prac. p. 123, and cases there cited. In State v. Hopkins, 50 Vt. 316, the court said (page 331): "The rule upon this subject is that, where new matter is called out by cross-examination, the witness as to such new matter is regarded as the witness of the party who calls it out, and he is subject to the same rules as to the right of cross-examination as he would be if the party calling out such new matter had first produced the witness." In People v. Buchanan, 145 N. Y. 1, 39 N. E. 846, it was held: "A witness may be examined by the party calling him upon all topics on which he has

been cross-examined, and this although the cross-examination was as to facts not admissible in evidence." We think the scope of the cross-examination of this witness made the question now under consideration a competent one, and there was error in overruling. But, even if the letter of instructions was to be construed by the court, still it was error to direct a verdict for the defendants. Read in connection with the other documents in the cause and the undisputed facts, the letter may fairly be construed to be a direction to the agents to endeavor to agree with the insured in a reduction of the amount of the policy, and, if unsuccessful, to report to the managers, to the end that the policy might then be canceled according to its terms. In the absence of a report to the contrary, the managers could conclude that the reduction had been made, and a case existed for a jury whether the plaintiff had not sustained injury through a breach of the defendants' duty. In this aspect of the case, the pleadings may need to be remolded, but that is a matter of course. Numerous propositions were argued before us, but they relate mainly to matters of defense, and in the present disposition of the case it is not necessary to discuss them. The judgment of the court below should be reversed, and a venire de novo issued.

Accord. Phoenix Ins. Co. v. Frissell, 142 Mass. 513; Greenleaf v. Moody, 13 Allen (Mass.) 363; Royal Ins. Co. v. Clark, 61 Minn. 476; Winne v. Niagara Fire Ins. Co., 91 N. Y. 185.

ROCKFORD INS. CO. v. WINFIELD.

Supreme Court of Kansas. Jan. 8, 1897. 57 Kansas 576.

Agency—Dual Relations.

On February 19, 1892, M. A. Winfield filed her petition against the Rockford Insurance Company, to recover $2,000

and interest on a policy of insurance of date December 4, 1891, alleging the loss of the insured property by fire, January 23, 1892. The insurance in favor of M. A. Winfield was described in the policy as being "on her stock of implements, buggies, spring wagons, sewing machines, separators, steam engines, horse power and machine fixtures, baled broom corn, baled hay, grain and seeds of all kinds, and such other merchandise as is usually kept in a grain and implement store and warehouse, her own or held by her in trust or on commission, or sold, but not delivered, all contained in the first story of the one and two story stone and brick, metal-roofed building, situated on lot 1, block 35, New Chicago (now Chanute), Kansas: $3,500. Other concurrent insurance permitted." The policy was signed by the president and the secretary of the insurance company, and countersigned at Chanute, by J. O. Johnston, agent. Johnston was at the same time cashier of the Bank of Chanute, and president of the First National Bank of Erie. M. A. Winfield was largely indebted to said banks, and, to secure the claims, certain notes were deposited as collateral security, but the banks relied mainly upon certain warehouse receipts of the form following: "No. ———. Chanute, Kansas, Nov. 3, '91. Received in warehouse at Chanute, Kansas, from the First National Bank of Erie, Kansas (or the Bank of Chanute, Kansas), five thousand bushels of prime flax seed, No. one, subject only to the order hereon of the said bank, and the surrender of this receipt. No charges are to be made for the storage of this property, and it is understood that it is absolutely the property of the said bank, to be disposed of at their will and pleasure, and it is only in our possession for storage and safe-keeping. Loss by fire or heating at our risk. M. A. Winfield." These receipts covered nearly all the grain and seeds in the warehouse at the time of the fire, and the indebtedness to the banks was in excess of the value of such grain and seeds. Charles F. Prange was a dealer in agricultural implements, separators, horse power, and machine fixtures, and for some years past he had kept his goods in the one-story part of the building,

paying storage thereon to M. A. Winfield, and she insuring the property as in this instance, without any mention of the real ownership. Johnston did not advise the insurance company as to the nature of this business, and he made no mention of the fact that the banks of which he was an officer substantially owned all the grain and seeds in the warehouse. On the day that the policy was issued, Johnston made a report thereof to the company in the usual manner, and on December 24th he remitted to it the premiums on this and certain other policies, less his commissions. The risk was declined by the company December 21st, in a notification to the agent, who was credited with the premium, and ordered to cancel the policy without delay; but the direction upon the envelope was to "Joe Johnston, Agt., Chanute, Kansas," and this misdirection probably led to its detention for a time in the post office at Chanute, for Johnston had not received it on January 6, 1892, when he started on a trip East; but the letter followed him to New York City, where it was delivered to him by the Chemical National Bank on January 20th or 21st. He opened it hastily, with other mail there, and testifies that he put it into his pocket, and forgot it, until he was on his way back as far as Kansas City, about the last of January, when he heard of the loss of the property by fire. Soon after his arrival at Chanute, and about February 1st, he was called upon by special agents representing the Rockford Company and two others, which had issued policies amounting to $2,500 in addition to that held by the Rockford Company. These special agents made partial inquiry as to the loss, and went away, but returned again about two days thereafter, and their investigation was resumed. They requested from S. Winfield, the husband and agent of M. A. Winfield, an itemized statement of the property destroyed. He explained to them that all his books of account, weigh books, etc., had been destroyed by the fire, and that it was impossible to make an exact statement, especially as to the grain and seeds. They then told him that the company was not liable for the Prange property, and that they would not

consider the loss as to the grain and seeds unless it was eliminated. At length, on or about February 6th, Winfield delivered to them a written document, directed to them, containing an itemized statement of the quantity and value of the different kinds of grain, seeds, machinery, and property destroyed by the fire; the amount for grain, seeds, etc., being $2,721.95, and that for the machinery being $2,977.27, or a total of $5,699.22. This list, after the direction to the several companies, was headed by the following words: "Gentlemen: I hereby submit to you the following itemized statement of my loss of property insured by you, which occurred by fire January 23, 1892. [Signed] M. A. Winfield." The document was not verified, and there was no certificate of a magistrate or other officer that he verily believed the assured had without fraud sustained loss of the property insured to an amount certified by such magistrate, as required by the terms of the policy, and the foregoing was the only proof of loss made by the assured. On the night of February 6th said special agents wrote a letter, of which the following is a copy: "Chanute, Kansas, February 6th, 1891. To M. A. Winfield, Chanute, Kas.: You are hereby notified that the statement presented by you through Samuel Winfield (who represents himself to be your attorney in fact), and purporting to show a claim against the companies represented by us, is not sufficient, and cannot be accepted by us. From it we are unable to ascertain from what source or to what extent in amount your purchases have been, or what the amount of your sales or consignments were at any time during the year 1891, and prior to the date of the alleged fire, you having alleged that everything in the nature of data relating thereto for the year 1891, and up to and including the date of the alleged fire, has been destroyed. We are not in a position to admit or deny liability at this time. You are hereby requested, as required by the printed conditions of our policies, to produce certified copies of all bills or other evidence of your purchases, either for cash or on credit, or of any property consigned to you on commission from any and

all parties with whom you have transacted business during the year 1891, and up to and including the date of the alleged fire, and alleged to have been destroyed or damaged; also, certified copies of all shipments or consignments or sales made by you during the year 1891, and up to and including the date of the alleged fire; also, certified copies of your general banking account with any bank or banks showing the amounts drawn by you, by checks or otherwise, for the purchase of any property during the year 1891, and up to and including the date of the fire; and any other data or evidence which you have or can procure bearing upon your alleged claim. In making these requests, it is understood we waive none of the conditions of our policies, but shall expect a strict compliance with the printed condition thereof on your part. The Liverpool, London & Globe Ins. Co., by M. W. Van Valkenburg, Spa. The Milwaukee Mechanics' Insurance Co., by M. W. Van Valkenburg, Spa. Rockford Insurance Co., by F. T. M. Wenie, Spa." This letter was brought by one of the special agents to Topeka, whence it was forwarded to M. A. Winfield, by registered mail, and she received it February 8, 1892. Her husband and agent testified that a compliance with the request contained in said letter was impossible, because the grain and seeds were purchased in small quantities, from a great number of persons, residing in several counties, and that all accounts of these transactions were destroyed by the fire. On April 27, 1892, each of said banks commenced an action against M. A. Winfield upon said indebtedness, and they proceeded by garnishment against said insurance companies; and in July, 1892, the Bank of Chanute recovered a judgment for $3,069.31, and the First National Bank of Erie obtained a judgment for $1,189.50. This cause was tried before the court and a jury at November term, 1892, and the plaintiff recovered a judgment for $2,092. A motion for a new trial being overruled, the defendant insurance company prosecutes its petition in error in this court.

Martin, C. J. (after stating the facts). 1. When the policy was written, J. O. Johnston was the agent of the in-

surance company, the cashier of the Bank of Chanute, and the president of the First National Bank of Erie. The assured was indebted to these banks in a sum exceeding the value of all the grain and seeds in store, and these were substantially covered by the warehouse receipts held by the banks. This condition of affairs was not disclosed to the insurance company by its agent. So far as it related to the grain and seeds, the policy was issued for the use and benefit of these banks. It is an elementary doctrine, subject to certain exceptions not applicable here, that an agent cannot, in the same transaction, represent two principals whose interests are conflicting or antagonistic. The law has too much regard for the infirmities of human nature to sanction such a double relation. When an insurance company employs an agent to solicit business for it in a particular locality, it has a right to expect that he will act only in its interest in that business. He would not be authorized to write a policy upon his own property, for as to this he would not be the agent of the company, and it would not be bound thereby, unless, being fully informed of the facts, the principal officers of the company should accept the risk. Story, Ag. §§ 10, 210; May, Ins. § 125. In New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85, 91, it is said: "It is not necessary for a party seeking to avoid a contract on this ground to show that an improper advantage has been gained over him. It is at his option to repudiate or to affirm the contract, irrespective of any proof of actual fraud." The purpose of the doctrine is to remove the temptation to fraud and imposition on the part of those occupying fiduciary relations, by divesting them of the legal power to make such fraud or imposition effective. In this case the insurance company declined the risk, but the assured was not advised of the declination until after the loss, and this may have been the result of the negligence of the company in misdirecting the letter. Had Johnston been the agent of the company, in fact and in law, as to this transaction, the result of the delay in notification should have been visited upon the company; but

as to this insurance Johnston did not sustain that relation, and the company, not accepting, but declining, the risk, was not bound by the terms of the policy. See, further, Bentley v. Insurance Co., 19 Barb. 595; Spare v. Insurance Co., 19 Fed. 14; Zimmerman v. Insurance Co. (Mich.) 68 N. W. 215.

2. It was the duty of the assured, under the policy, to make proofs of her loss substantially as prescribed therein; and this she failed to do, although she had ample time after the receipt of the letter of date February 6th, and before the expiration of the 30 days from the loss. Indeed, she brought suit within less time, although the policy provided that the loss should be payable 60 days after the proofs should be received at the office of the company. The letter distinctly informed the assured that the statement presented was not sufficient, and could not be accepted, and that the special agent waived none of the conditions of the policy, but would expect a strict compliance with the printed conditions thereof; yet the assured did nothing further towards a compliance with the terms of the policy and the demands of the insurance company. The reasons assigned by the assured for noncompliance are deemed insufficient by a majority of this court, although the evidence tends to show, and, for the purpose of sustaining, the judgment should be held to prove, that the special agent declined to consider the loss, unless the claim for the Prange implements and machinery should be detached or eliminated; and a compliance with the requirements specially pressed in the letter was impracticable, if not entirely impossible. The writer is of opinion that the claim of the assured ought not to be defeated on this ground. The special agents called to investigate and adjust the loss within little more than a week after the fire, and before they had any right to expect formal proofs of loss. They then required an itemized statement, which was made during the investigation. It was not verified, and there was no certificate of a local magistrate. If the assured had been able to give the information requested in the letter as to purchases and shipments for 1891,

and up to the time of the fire, yet this would have been of no value without knowing the quantities and the kinds of grain and seeds in the warehouse at the beginning of 1891. The ultimate fact was the amount of each kind of grain and seeds in store at the time of the fire, and not when or how it was placed there, and partial information as to the facts requested would tend to obscure, rather than to disclose, the truth. In respect to the verification and the certification, the statement of loss was informal; but as the special agents had investigated the matter on the ground during the greater part of a week, and, in writing, the letter made no special objection for these reasons, but, on the contrary, required information which the assured could not give, and as they refused to consider the loss unless the claim for the greater part of it was abandoned, the writer is of opinion that formal proofs should be held to be waived, and that the rights of the assured ought not to be sacrificed upon a technical insistence, devoid of substantial merit. The judgment must be reversed, and the cause remanded for a new trial.

Accord. Idaho Forwarding Co. v. Firemen's Fund Ins. Co., 8 Utah 41.

Note. Brokers and solicitors may represent the insured in making the application, and the insurer in the issuance of the policy. Hooper v. People, 155 U. S. 648; Monitor Mutual Ins. Co. v. Young, 111 Mass. 537.

BLACK v. SECURITY MUT. LIFE ASS'N.

Supreme Judicial Court of Maine. Jan. 31, 1901. 95 Maine 35.

Insurance—Agent—License.

Wiswell, C. J. Action of assumpsit, upon an account annexed to the writ, to recover commissions upon premiums paid by various persons to the defendant on policies

of life insurance issued by it, the applications for which were solicited, received, and forwarded to the defendant by the plaintiff under a written contract between the plaintiff and the defendant wherein the plaintiff was appointed an agent of the defendant "for the purpose of procuring and effecting applications for insurance," and which provided for the compensation that was to be received by the plaintiff.

At the trial the defendant, among other defenses, contended that some or all of the applications of these persons for insurance were solicited, received, and forwarded to the defendant at a time when the plaintiff had no license from the insurance commissioner of this state as provided by Rev. St. c. 49, § 73, and subsequent amendments, and that consequently the plaintiff could not recover. The case shows that the plaintiff had no such license between July 1 and October 18, 1897.

Thereupon the defendant's counsel requested the presiding justice to instruct the jury that the plaintiff could not recover any commission upon the premiums paid to the company in cases where the applications for such insurance were solicited by the plaintiff during the period that he was without such a license. The requested instruction was applicable to the state of facts involved, because, although the policies may have been in fact issued after October 18, 1897, and during a period when the plaintiff had a license, it is clear that in more or less instances the plaintiff's work in soliciting and receiving applications for the policies was performed during the period that he was without a license.

In order to give progress to the case, the presiding justice declined to give the requested instruction, but did instruct the jury "that for any policy bearing date subsequent to the 18th of October the plaintiff is entitled to his commission from the company upon that risk, although he may have solicited the insurance before that time and made himself liable to the penalty." To this refusal to instruct, and to the instruction given, the defendant (the verdict being for the plaintiff) took exception.

The statute above referred to, as last amended by chapter 95, Pub. Laws 1895, after providing that the commissioner may issue a license to any person to act as an agent of a domestic insurance company, and to any resident of the state to act as agent of any foreign insurance company, which has received a license as provided by another section, and after fixing the fee that shall be received by the commissioner for each license, contains this language: "And if any person solicits, receives or forwards any risk or application for insurance to any company, without first receiving such license, or fraudulently assumes to be an agent and thus procures risks and receives money for premiums, he forfeits not more than fifty dollars for each offense; but any policy issued on such application binds the company if otherwise valid."

Although this statute contains no express provision preventing a recovery for his services by one who acts as an agent of an insurance company without such license, and does not expressly provide that contracts for such services shall be void, it prohibits the performance of such services, without the license referred to, under the penalty therein provided. In Harding v. Hagar, 60 Me. 340, —a very similar case in principle,—this court said in its opinion: "It is too well settled to require the citation of authorities that no party can recover for acts or services done in direct contravention of an express statute, or for property so sold and delivered." In Randall v. Tuell, 89 Me. 443, 36 Atl. 910, 38 L. R. A., 143, where the authorities are fully collected, the principle is thus stated: "It is the general doctrine, now settled by the great weight of legal authority, that where a license is required for the protection of the public and to prevent improper persons from engaging in a particular business, and the license is not for revenue merely, a contract made by an unlicensed person in violation of the act is void."

In accordance with these authorities, and many others that might be referred to, it must be held that the plaintiff cannot recover for the services performed by him in direct contravention of the statute. The purpose of the

statute is undoubtedly for the protection of the public. It is clearly not for revenue. The license fee required was only the sum of two dollars. True, the statute referred to provides that a policy issued in such a case shall not thereby be void, but the contract of insurance is not the one under consideration here. It is the contract between the company and the plaintiff by virtue of which the latter performs services in obtaining applications for insurance which the statute prohibits unless the person performing such service has a license therefor.

The evidence as to when these aplications for insurance were solicited and obtained by the plaintiff is somewhat indefinite, but some of them were unquestionably received when the plaintiff had no license, and the burden is upon him to show that he had a license when the services were performed. Harding v. Hagar, supra.

Exceptions sustained.

Accord. Pratt v. Burdon, 168 Mass, 596, 47 N. E. 419.

SUPREME LODGE KNIGHTS OF PYTHIAS, Plff. in Err., v. JOSEPHINE R. WITHERS.

Supreme Court of United States. March, 1900. 177 U. S. 260. 20 S. C. Rep. 612.

Secretary as Agent of Order.

Mr. Justice Brown delivered the opinion of the court:

The Supreme Lodge Knights of Pythias is a fraternal and benevolent society, incorporated by an act of Congress of June 29, 1894 (28 Stat. at L. 96, chap. 119), as the successor of a former corporation of the same name, organized under an act approved May 5, 1870. The beneficial or insurance branch of the order is known as the endowment rank, which is composed of those members of the order who have taken out benefit certificates. Such

members are admitted into local subordinate branches known as sections. The members of each section elect their own president and secretary. The endowment rank is governed by a board of control whose officers are a president and secretary, and whose place of business is in Chicago. The endowment rank is governed by a constitution and general laws enacted by the Supreme Lodge, and by rules and regulations adopted by the board of control and approved by the Supreme Lodge.

On January 1, 1883, Robert W. Withers made application for membership in the endowment rank, and in that application made the following statement: "I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules, and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." His application was accepted, and, after receiving a certificate under the first act of incorporation which he voluntarily surrendered, he received the certificate upon which this action is brought. This certificate recited the original application for membership dated January 1, 1883, the surrender of the former certificate and the application for transfer to the fourth class, which were "made a part of this contract, * * * and in consideration of the payment heretofore to the said endowment rank of all monthly payments, as required, and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of $3,000 will be paid by the Supreme Lodge, etc., to Josephine R. Withers, wife, * * * upon due notice and proof of death and good standing in the rank at the time of his death, * * * and it is understood and agreed that any violation of the within-mentioned conditions or other requirements of the laws in force governing this right shall render this certificate and all claims null and void, and the said Supreme Lodge shall not be liable for the above sum or any part thereof."

Withers was a member of section 432, at Greensboro, Alabama, of which one Chadwick was secretary. By the laws of the endowment rank Withers was required to pay $4.90 monthly in accordance with his age and the amount of his endowment.

In January, 1894, defendant adopted and promulgated the following general laws:

"Sec. 4. Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of section without notice, on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the certificate of endowment and all right, title, and interest, such member or his beneficiaries may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited certificate. If approved by the medical examiner-in-chief and accepted by the board of control, a new certificate shall be issued, and the rating shall hereafter be at the age of nearest birthday to the date of the last application."

"Sec. 6. The secretary of the section shall forward to the board of control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the board of control on or before the last day of the same month the section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title, and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the board of control to the president and secretary of such section.

"Provided, that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all right as a section, and any sur-

viving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said section shall pay to the board of control the amount of all monthly payments, assessments, and dues accrued upon said members.

"Sec. 10. Sections of Endowment Ranks shall be responsible and liable to the board of control for all moneys collected by the secretary or other officers from the members for monthly payments, assessments, or dues not paid over to the board within the time and manner prescribed by law. Officers of sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the board of control or of the Endowment Rank or of the Supreme Lodge."

For over twelve years Withers made his monthly payments as required by law to the secretary of the section, and the money was regularly remitted to the board of control at Chicago. His last payment was made prior to October 10, 1895, as required by section 4, for the dues of that month. As there were a large number of members in the section, and as their dues were not all collected until the latter part of the month, the secretary of the section did not send the money to the board of control until October 31, when he mailed to the secretary of that board a check covering all the amounts due by all the members of the section for that month. The letter did not leave the postoffice until the next day, and was received by the board of control November 4. No notice was ever mailed by the board of control to Withers notifying him of his suspension; but on November 1st, as required by section 6, the secretary of the board of control mailed to Mr. Chadwick, the secretary of the section at Greensboro, a notice of the suspension of all members thereof, with an intimation that the members of the section might regain their rights under certain conditions therein named. No notice was mailed to the president of the section. In view of the technical character of the defense, it is worthy of mention that the board of control did not strictly comply with its own regulation in this particular.

Upon receiving the remittance, and on November 4, the secretary of the board of control mailed the following postal card to the secretary of the section:

Office Board of Control,
Chicago, November 4, 1895.

Received of Section No. 432 one hundred and thirteen 30-100 dollars in payment of monthly payments and dues for October, 1895, on condition that all members for whom above payment is made were living at date of this receipt.

H. B. Stolte,
Secretary Board of Control.

The insured was suddenly taken ill and died of an attack of cholera morbus on November 1, 1895. Proofs of death were waived by the defendant, which, however, refused to pay the amount of the certificate.

It is hardly necessary to say that the defense in this case is an extremely technical one, and does not commend itself to the average sense of justice. It ought to be made out with literal exactness. It is admitted that Withers for twelve years paid all his dues promptly to the secretary of the section as required by section 4 of the general laws, and that the failure of the board of control to receive them on or before the last day of the month was the fault of the secretary, and not of the insured. The whole defense rests upon the final clause of section 10, declaring that "officers of sections are the agents of the members and shall in no wise be considered as the agents of the representatives of the board of control of the Endowment Rank or of the Supreme Lodge." It appears to have been the habit of the secretary, Mr. Chadwick, not to remit each payment as it was made, but to allow all the dues of each month to collect in his hands and to remit them together by a check covering the whole amount, about the close of the month. In this connection he makes the following statement: "It had never been the custom of my office for me to send the money off by the twentieth of the month" (although section 6 required him to forward it immediately after the tenth). "I usually

sent the money off about the last days of the month. For the previous year I had mailed to the secretary of the board of control the dues of the section as follows: October 27, 1894, November 28, 1894, December 29, 1894, January 29, 1895, February 27, 1895, March 30, 1895, April 29, 1895, June 29, 1895, July 8, 1895, August 29, 1895, September 28, 1895, October 28, 1895, October 31, 1895—all of which sums were accepted by the board of control."

The position now taken by the defendant, that in receiving the money from the insured members, and remitting the same to the board of control, the secretary of the section was the agent of the insured and not of the board of control, is inconsistent with the requirement of section 4, which make it obligatory upon policy holders to pay their monthly dues to the secretary of the section, and to him only, as well as with the provision of section 10, that "sections of Endowment Rank shall be responsible and liable to the board of control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments, or dues not paid over to the board within the time and manner prsecribed by law." The question at once suggests itself, To whom does the money belong when paid to the secretary of the section? If to the insured, it was within his power to reclaim it at any time before it was remitted. If to the board of control, it was the duty of the secretary of the section to remit it. Why, too, should the board of control attempt to deal with it at all beyond requiring it to be paid them by a certain day? Section 10 is a complete answer since that makes the sections responsible to the board of control from the moment the money is collected, and section 6 makes it the duty of the secretary to remit it at once.

There seems to have been an attempt on the part of the defendant to invest Mr. Chadwick with the power and authority of an agent, and at the same time to repudiate his agency. But the refusal to acknowledge him as agent does not make him the less so, if the principal assume to control his conduct. It is as if a creditor should instruct his debtor to pay his claim to a third person, and at the same time declare that such third person was not his agent to receive the money. It would

scarcely be contended, however, that such payment would not be a good discharge of the debt, though the third person never accounted to the creditor; much less, that it would not be a good payment as of a certain day, though the remittance, through the fault of the person receiving it, did not reach the creditor until the following day.

The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section, who was bound to remit them to the board of control; but they could not compel him to remit, and were thus completely at his mercy. If he chose to play into the hands of the company, it was possible for him, by delaying his remittance until after the end of the month, to cause a suspension of every certificate within his jurisdiction; and in case such remittance was not made within thirty days from such suspension (sec. 6) apparently to make it necessary under section 4 for each policy holder to regain his membership by making a new application, surrendering his forfeited certificate, making payment of the required membership fee, undergoing a new medical examination, and paying a premium determined by his age at the date of the last application. In other words, by the failure of the secretary, over whom he had no control, to remit within thirty days, every member of the section might lose his rights under his certificate and stand in the position of one making a new application, with a forfeiture of all premiums previously paid. The new certificate would, of course, be refused if his health in the meantime had deteriorated, and the examining physician refused to approve his application. This would enable the company at its will to relieve itself of the burdens of undesirable risks by refusing certificates of membership to all whose health had become impaired since the original certificate was taken out, though such certificate-holder may have been personally prompt in making his monthly payments.

It could not thus clothe the secretaries of the sections with the powers of agents by authorizing them to receive monthly payments and instructing them to account for and remit them to the Supreme Lodge at Chicago, and in the same breath deny that they were agents at all. The very definition of an agent, given by Bouvier, as "one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it" presupposes that the acts done by the agent shall be done in the interest of the principal, and that he shall receive his instructions from him. In this case the agent received his instructions from the Supreme Lodge, and his actions were, at least, as much for the convenience of the lodge as for that of the insured. If the Supreme Lodge intrusted Chadwick with a certain authority, it stands in no position to deny that he was its agent within the scope of that authority.

The reports are by no means barren of cases turning upon the proper construction of this so-called "agency clause," under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others, it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policyholder, and in all, it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice. Wherever the agency clause is inconsistent with the other clauses of the policy, conferring power and authority upon the agent, he is treated as the agent of the company rather than of the policy holder. The object of the clause in most cases is to transfer the responsibility for his acts from the party to whom it properly belongs, to one who generally has no knowledge of its existence. It is usually introduced into policies in connection with the application, and for the purpose of making the agent of the company the agent of the party making the application, with respect to the statements therein contained.

It was formerly held in New York (Rohrbach v. Germania

F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451, and Alexander v. Germania F. Ins. Co. 66 N. Y. 464, 23 Am. Rep. 76), that, where the insured had contracted that the person who had procured the insurance should be deemed his agent, he must abide by his agreement; and where such person had, through fault or mistake, misstated in the application to the company the declarations of the assured, the latter must suffer for the error or wrong; but in a subsequent case (Whited v. Germania F. Ins. Co. 76 N. Y. 415, 32 Am. Rep. 330), this doctrine was held to be limited to such acts as the agent performed in connection with the original application, and that in a renewal of the policy such party was treated as the agent of the defendant, for whose acts it was bound; and that it was within his power to make a valid waiver of the conditions of the policy. Said the court in its opinion: "That he was the agent of the defendant it would be fatuous to deny; were it not for a clause in the policy" (the agency clause) "upon which the defendant builds. * * * But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured * * * he may not be taken into the service of the insurer as its agent also; or if he is so taken, the insurer must be bound by his acts and words, when he stands in its place and moves and speaks as one having authority from it; and pro hac vice, at least, he does then rightfully put off his agency for the insured and put on that for the insurer. * * * Nor will it hold the plaintiff so strictly to the contract he made as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them and while under authority from the defendant to act for it." So in Sprague v. Holland Purchase Ins. Co. 69 N. Y. 128, the insured signed a blank form of application, which was filled up by the company's agent without any knowledge or dictation of the insured. There were false statements therein, occasioned by the mistake or inadvertence of the agent. The policy contained the agency clause, as well as the condition that the application must be made out by the

defendant's authorized agent, and it was held, using the language of the court in the Whited Case, that the latter clause "swallowed down" the former, and that there was no warranty binding upon the plaintiff.

In Patridge v. Commercial F. Ins. Co. 17 Hun. 95, it was said of the agency clause: "This is a provision which deserves the condemnation of courts, whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the president of the assured. * * * Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. And when a contract is, in fact, made through the agent of a party, the acts of that agent in that respect are binding on his principal."

In Nassauer v. Susquehanna Mut. F. Ins. Co. 109 Pa. 509, under a by-law providing that "in all cases the person forwarding applications shall be deemed the agent of the applicant," it was held, under the circumstances of the case, that the agent of the company soliciting insurance was not the agent of the applicant, and that such by-law was not binding upon him. Although the insured is supposed to know at his peril the conditions of the policy, that will not bind him to a provision which is not true, and one which the company had no right to insert therein. "We do not assent," said the court, "to the proposition that the offer" (that the agent made his own valuation of the property) "was incompetent, because Laubach was the agent of the assured in filling up the application and forwarding it to the company. He was not the agent of the assured. The latter had not employed him for any purpose. He was the agent of the defendant company, and as such called upon the assured and solicited a policy, and having obtained his consent proceeded to fill up the application for him to sign. As to all these preliminary matters the person soliciting the insurance is the agent of the company." The court, speaking of the agency clause, observed: "This court, in the case above cited [Columbia Ins. Co.

v. Cooper, 50 Pa. 331], characterized a somewhat similar provision as a 'cunning condition.' The court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein. He was not bound to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence, a by-law of the company of which he had no knowledge, and by which he was not bound, could not affect him in matters occurring before the granting of the policy. * *

* And even a by-law of a mutual company which declares that black is white, does not necessarily make it so." Similar cases are those of Eilenberger v. Protective Mut. F. Ins. Co. 89 Pa. 464; Susquehanna Mut. F. Ins. Co. v. Cusick, 109 Pa. 157; and Kister v. Lebanon Mut. Ins. Co. 128 Pa. 553, 5 L. R. A. 646, 18 Atl. 447.

The case of Lycoming F. Ins. Co. v. Ward, 90 Ill. 545, resembles the case under consideration. In that case it was held that, where the assured contracts with one as the agent of the insurer, believing him to be such, and does not employ such supposed agent to act for him in obtaining insurance, such person has no power to act for or bind the insured, though the policy may provide that the person procuring the insurance shall be deemed the agent of the insured, and not of the company. Plaintiff paid the premium to the person with whom she contracted for the insurance, and of whom she obtained the policy. It was held that such person, assuming

to be the agent of the company, the payment was binding upon the company, whether he paid the money over or not. In that case the person to whom the money was paid was not in reality an agent of the company, although plaintiff believed him to be such, but only a street insurance broker, who represented himself to be the agent of the company. Said the court: "Under such circumstances who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was an innocent party in the transaction, or should it fall upon the company, who alone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company."

In Indiana it is also held that a recital in the policy that the broker obtaining an insurance is the agent of the insured is not conclusive upon that subject. Indiana Ins. Co. v. Hartwell, 100 Ind. 566. In North British & M. Ins. Co. v. Crutchfield, 108 Ind. 518, 9 N. E. 458, the agency clause was held to be absolutely void as applied to a local agent, upon whose counter signature the validity of the policy, by its terms, was made to depend.

In Boetcher v. Hawkeye Ins. Co. 47 Iowa 253, it was held that, if the assured had the right to believe the soliciting agent was the agent of the company, the insertion of a clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage.

Speaking of the agency clause in Continental Ins. Co. v. Pearce, 39 Kan. 396, 18 Pac. 291, it is said: "This is but a form of words to attempt to create on paper an agency which in fact never existed. It is an attempt of the company, not

to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when, in fact, such relation never existed. * * * We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority." See also Kausal v. Minnesota Farmers' Mut. F. Ins. Asso. 31 Minn. 17, 47 Am. Rep. 776, 16 N. W. 430, in which the act of an insurance agent in making out an incorrect application was held chargeable to the insurer, and not to the insured, notwithstanding the insertion of an agency clause in the policy.

In Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521, an agency clause in a policy of insurance was held to be void, as involving a legal contradiction. The applicant made truthful answers to certain interrogatories propounded by the agent, who stated certain things that were not true. They were held not to be binding upon the insured. Speaking of the agency clause, it is said: "The verbiage of this condition is not candid; it seems to have been used with studied design to obscure the real purpose. It is a snare, set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the aplication; nor is the agent in his printed instructions enjoined to inform those with whom he treats of it. * * * Its inevitable effect is to greatly weaken the indemnity on which the assured rely. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land their agents and representatives to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them; and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation

or restriction of power, but the dissolution of the relationship with themselves and the establishment of it between other parties."

The case of Schunck v. Gegenseitiger Wittwen and Waisen Fond, 44 Wis. 369, is almost precisely like the instant case. The constitution of the defendant corporation, whose governing body or directory was elected by the several "groves" (corresponding to the sections in this case) of the United Ancient Order of Druids, declared that every member whose assessment was not paid by his grove to the directory within thirty days after demand made forfeited his claim to have a certain sum in the nature of life insurance paid to his widow, or heirs, after his death. It was held that, in view of all the provisions of such constitution, the benevolent object of the corporation, and the fact that the several groves are, at least, as much its agents to collect and pay over the dues of their members, as they are agents of the latter, in case of a member whose dues have been fully paid to his grove at the time of his death, the amount of insurance might be recovered, notwithstanding a default of the grove in paying over such dues to the defendant.

The agency clause was also once before this court in the case of Grace v. American C. Ins. Co. 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207, in which a clause in the policy that the person procuring the insurance to be taken should be deemed the agent of the assured and not of the company, was held to import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in the matters immediately connected with the procurement of the policy, and that, where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.

In the following cases the officers of the subordinate lodge, or conclave, were treated as the agents of the Supreme Conclave in the manner of granting extensions of time for the payments of assessments: Whiteside v. Supreme Conclave I. O. of H. 82 Fed. Rep. 275; Knights of Pythias of the World v. Bridges, 15 Tex. Civ. App. 196, 39 S. W. 333.

In the case under consideration it may be immaterial, except as bearing upon the equities of the case, that the agency clause was introduced into the general laws of the order in January, 1894, eleven years after the first certificate was issued to the assured, and nearly nine years after the certificate was issued upon which suit was brought. There is no evidence that it was ever called to Withers' attention, or that he had actual knowledge of it. If he were bound at all, it could only be by the stipulation in his original application, and by the terms of his certificate that "he would be bound by the rules and regulations of the order, now in force or that may hereafter be enacted." All that is required of him is a full compliance with such laws, and there is not the slightest evidence that he failed personally in any particular to comply with any laws of the order, present or future. The only failure was that of the secretary of the section, who, to say the least, was as much the agent of the order as he was of Withers, although the latter is sought to be charged with his dereliction by a clause inserted in the general laws long after the certificate was issued. The decisive consideration is this: Chadwick was the agent of the defendant, and of the defendant only, after the receipt of the money from Withers. Under section 10 he then became responsible for it to the board of control. In rendering his monthly accounts and paying over the money he acted solely for the defendant. From the time he paid the money to Chadwick the insured had no control over him, and was not interested in its disposition. Unless we are to hold the insured responsible for a default of this agent, which he could not possibly prevent, we are bound to say that his payment to this agent discharged his full obligation to the defendant. That it should have the power of declaring that the default of Chadwick, by so much as one day (and it did not exceed four days in this case), to pay over this money, should cause a forfeiture of every certificate within his jurisdiction, is a practical injustice too gross to be tolerated.

Without indorsing everything that is said in the cases above cited, we should be running counter to an overwhelming weight of authority were we to hold that the agency clause

should be given full effect regardless of other clauses in the certificate or the by-laws, indicative of an intention to make the officers of subordinate lodges agents of the supreme or central authority. We should rather seek to avoid, as far as possible, any injustice arising from a too literal interpretation, and only give the clause such effect as is consistent with the other by-laws and with the manifest equities of the case. We are therefore of opinion that in this case the secretary of the section was in reality the agent of the Supreme Lodge from the time he received the monthly payments, and that the insured was not responsible for his failure to remit immediately after the tenth of the month.

We have not overlooked in this connection the case of Campbell v. Supreme Lodge K. of P. of the World, 168 Mass. 397, 47 N. E. 109 in which a different conclusion was reached upon a similar state of facts. In that case plaintiff put his right to recover upon the theory that the mailing of the remittance was a compliance with the requirement of section 6 that such payments and dues should be received on or before the last day of the month. This position was held by the court to be untenable. It was said that the money must have been actually received at the office of the board of control before the end of the month. The question of agency was not considered, and the trend of the argument so different that the case cannot be considered an authority upon the propositions here discussed. The cases of Peet v. Great Camp of K. of M. of the World, 83 Mich. 92, 47 N. W. 119, and McClure v. Supreme Lodge K. of H. 41 App. Div. 131, 59 N. Y. Supp. 764, are not in point.

The judgments of the Circuit Court and of the Court of Appeals were right, and they are therefore affirmed.

FRED MILLER BREWING CO. v. COUNCIL BLUFFS INS. CO.

Supreme Court of Iowa. May 23, 1895. 95 Ia. 31. 63 N. W. 565.

Agent—Service on Agent.

Robinson, J. The defendant is a corporation of this state engaged in transacting a fire insurance business. In May, 1887, it issued a policy which insured J. W. Maier on two buildings and personal property contained therein, situated in Medford, in the state of Wisconsin, against loss or damage by fire, for the term of one year, to the amount of $1,150. The loss, if any, was made payable to Fred Miller, a mortgagee of the insured property, as his interest should appear. Miller afterwards assigned his mortgage to the plaintiff. On the 30th day of March, 1888, the property insured was destroyed by fire. The judgment on which this action is founded was rendered, without an appearance by the defendant, on the 31st day of December, 1888, by the circuit court of Milwaukee county, in the state of Wisconsin, for the amount of the loss alleged to have been covered by the policy. The summons in that case was served on one E. H. Winchester as the agent of the defendant, in the state of Wisconsin. The defendant claims, and the district court found, that the service of the summons upon Winchester did not confer upon the Wisconsin court jurisdiction to render the judgment; that it was rendered without jurisdiction, and was void.

1. When the policy in question was issued, and when the summons in the action in Milwaukee county was served, Winchester resided in Clarke county, in the state of Wisconsin, and was engaged in the insurance and banking business. In May, 1887, he solicited of Maier the privilege of furnishing insurance upon the property which was afterwards destroyed, and agreed with him to insure it. He was unable to carry the insurance in the companies for which he was then agent, and wrote to an insurance broker of Chicago, named W. W. Caldwell, for the insurance required. There-

upon Caldwell applied to E. T. Marshall & Co., also of Chicago, for insurance. They were the general agents in that city of the defendant, and had authority to write and deliver policies on acceptable risks located anywhere in the United States, outside of the state of Illinois. They issued the policy in question, charged it to Caldwell, and gave it to him for delivery. He sent it to Winchester, in Wisconsin, and he delivered it to Maier, and collected the premium due thereon, of $76. Of that amount, Winchester retained 10 per cent. as commission, and transmitted the remainder to Caldwell. He retained an additional 5 per cent. as his commission, and paid the remainder to E. T. Marshall & Co. They did not know Winchester, in the transaction, and had no authority to appoint agents for the defendant in Wisconsin. The defendant had not complied with the laws of that state applicable to insurance companies, and was not authorized to transact business in it. Winchester did not apply for insurance by the defendant, nor did Caldwell. He applied personally for a specified amount of insurance, and E. T. Marshall & Co. filed his application by issuing the policies of such companies as they chose to select. Winchester did not know by what companies the policies would be issued, until he received them. He was never formally appointed an agent of the defendant, and had no authority to act for or represent it in any of the transactions in question, unless by virtue of what he did, and a section of the Revised Statutes of Wisconsin which is as follows: "Sec. 1977. Whoever solicits insurance on behalf of an insurance corporation or property owner or transmits an application for insurace, or a policy of insurance other than for himself, to or from any such corporation, or who makes any contract of insurance or collects any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business of like nature for any insurance corporation or advertises to do any such thing, shall be held an agent of such corporation to all intents and purposes, unless it can be shown that he receives no compensation for such services." Under the laws of Wisconsin, a civil action in a court of record is required to be com-

menced by the service of a summons; and when the action is against an insurance corporation not organized under the laws of that state, the summons may be served upon any agent of the corporation, within the definition of section 1977, in the state. Provision is also made for commencing actions of the character of that brought in Milwaukee county, when the defendant is a nonresident, in any county of the state which the plaintiff shall designate. It is well settled, as a general rule, that each state has the right to prescribe the terms and conditions on which foreign corporations may do business within its limits, or to exclude them wholly. It was said in Paul v. Virginia, 8 Wall. 168, that: "The corporation, being the mere creation of local law, can have no existence beyond the limits of the sovereignty where created. * * * The recognition of its existence, even, by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation, or the exercise of its powers, are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition, and the enforcement of its contracts, upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." This general rule was affirmed, and some exceptions to it noticed, in Hooper v. People, 15 Sup. Ct. 207. See, also, Insurance Co. v. Raymond (Mich.) 38 N. W. 482. Where a state prescribes conditions upon which a foreign corporation may do business within it, such corporation thereafter doing business in the state will be presumed to have assented to the conditions prescribed, and will be bound accordingly. Railroad Co. v. Harris, 12 Wall. 65; Ex parte Schollenberger, 96 U. S. 369. It is within the power of a state to prescribe the method by which corpor-

ations doing business within its jurisdiction may be brought into court, and to designate the officer or agent of such corporation upon whom the process necessary to commence an action may be served. Gross v. Nichols, 72 Iowa, 239, 33 N. W. 653; Childs v. Manufacturing Co., 104 N. Y. 479, 11 N. E. 50; Voorheis v. Association (Mich.) 48 N. W. 1087; 2 Cook, Stock, Stockh. & Corp. Law, § 758, note.

From an application of these rules to the facts in this case it follows that it was within the powers of the state of Wisconsin to make every person who should do the acts specified in section 1977 of the Revised Statutes an agent of the insurance corporation for whom he should act, and to provide that a service of a summons upon him, in a civil action, should have the effect of service upon the corporation. Therefore, if the facts which we have set out, and the statute we have quoted, made Winchester the agent of the defendant, service of the summons upon him was authorized.

In issuing the policy in question, did the defendant so far transact business in the state of Wisconsin as to come within the jurisdiction of its courts? As we have seen, it was not authorized to do business in the state, and had not appointed an agent within it. The application for insurance came to it without any solicitation whatever on its part. It had no knowledge of Winchester. He asked for, and was given, the privilege of obtaining insurance for Maier, but nothing was said by either of them in regard to insurance by the defendant. The application sent by Winchester to Caldwell was merely for a designated amount of insurance on the Maier property, and did not mention any company in which insurance was desired. The application made by Caldwell to E. T. Marshall & Co. was of precisely the same character, excepting that it was verbal. E. T. Marshall & Co., acting upon their own judgment or inclination, selected the defendant as one of the companies they represented, to give the required insurance. There was nothing in the acts of Winchester and Caldwell, prior to the time the defendant was selected to issue one of the policies desired, which could have made either of them an agent of the defendant in fact, or within the meaning of the Wisconsin statute, under any

permissible interpretation of it, for neither Winchester nor Caldwell had made any pretense of representing or soliciting insurance of or for the defendant. If the act of either, prior to the issuing of the policy, can be given the effect of an act of agency, it must be by means of a ratification authorized by the defendant, or created by the statute. It is the general rule that, in order to ratify an act of agency, the act must have been done by a person who, in doing it, claimed to represent a principal who was then in existence, and was known or could have been identified. Mechem, Ag. §§ 124—127. In this case the principal was not identified by either Winchester or Caldwell, but the latter gave to E. T. Marshall & Co. the right to designate the principals, and they did so by selecting the defendant as one of them. The knowledge had by that firm at the time the policy was issued is chargeable to the defendant, and it is bound by their act in issuing the policy. When it was issued, the defendant must be held to have known that it was on property situated in Wisconsin; that it was procured at the solicitation of Winchester; that it would be returned to him for delivery; that he would collect and remit the premium, deducting therefrom compensation for his services; and that Caldwell would also retain a compensation for himself. If the defendant did not know these facts, it could have ascertained them. Bennett v. Insurance Co., 70 Iowa, 600, 31 N. W. 948. It must be held to have known that, under the laws of Wisconsin, the person who in that state solicited the insurance, forwarded the application for it, or collected the premium, became by that act its agent, if the policy was issued. It could have refused to issue the policy, and thus have avoided liability under the Wisconsin laws; but, with actual or constructive knowledge of the effect of its act, it elected to and did deliver the policy. It is true that the delivery was in Chicago, and to a broker of that city, and that he was held responsible for the payment of the premium. But in issuing the policy and receiving the premiums the defendant accepted the benefits of the acts of Winchester, and still retains them. In issuing the policy on Wisconsin property, it transacted business in that state, for which it was organized. It not only did it in this instance,

but it had done it previously. Before the policy in question was issued, Winchester had taken five of its policies for his patrons, and has taken others since. Although E. T. Marshall & Co. were doing business in Chicago, they were authorized to issue policies on acceptable risks anywhere in the United States, excepting risks in the state of Illinois. They were authorized, therefore, to issue policies on risks in the state of Wisconsin; and when they did so they were transacting insurance business in that state, within the meaning and scope of its laws. If this be not so, then the laws of that state may be evaded by the expedient of denying the agency of persons who solicit insurance for it within the state, and issuing the policies outside of it. According to that theory, a company might be organized for the sole purpose of doing an insurance business in that state, and could transact all the business for which it was organized, however large the volume, without becoming amenable to the laws of the state. That such a construction of the law would open the way for defeating the right of the state to control the insurance business within its limits is evident, and that it would be an evasion of the legislative intent is clear. It should not, therefore, be adopted, unless there is no alternative. Section 1144 of the Code of this state prohibits certain foreign insurance companies from taking risks or transacting any business of insurance in this state, either directly or indirectly, unless possessed of a specified capital. In Seamans v. Zimmerman (Iowa) 59 N. W. 291, it appeared that a company of the kind contemplated by that section, organized under the laws of Wisconsin, had issued two policies of insurance on property situated in this state. The policies were issued in Wisconsin, on applications accepted there, and the contracts of insurance were valid in that state. They were held, however, to be in violation of the laws of this state. It was said the section of the Code referred to was designed to protect the property owners of this state from irresponsible insurance companies, and that the policies then under consideration belonged to the class which the general assembly intended to prohibit. The case is authority for the conclusion that the issuing of policies of insurance outside a

state on property within it is the doing of business within the state, which is subject to statutory regulation. We are of the opinion that an insurance company does business within the state of Wisconsin, within the meaning of its laws, when it issues policies of insurance, for delivery in that state, on property located therein, and that in this case Winchester must be regarded as the agent of the defendant. This view is in harmony with the decisions of the supreme court of that state. State v. United States Mut. Acc. Ass'n, 67 Wis. 624, 31 N. W. 229; Body v. Insurance Co., 63 Wis. 157, 23 N. W. 132; State v. Northwestern Endowment & Legacy Ass'n, 62 Wis. 174, 22 N. W. 135; Alkan v. Insurance Co., 53 Wis. 137, 10 N. W. 91; Schomer v. Insurance Co., 50 Wis. 576, 7 N. W. 544. The statutes of Wisconsin which authorized the judgment upon which this action is founded are designed for the protection of the property owners of that state. They are not contrary to the policy of this state, and there is no ground upon which the courts of this state should refuse to lend their aid in enforcing them. The case of Hooper v. People, 15 Sup. Ct. 207, supports, in a measure, the conclusion we reach.

2. As the law of Wisconsin made Winchester the agent of the defendant in effecting the insurance in question, it follows that no condition in the policy in terms making him the agent of the assured alone can be valid. It is said that, if the agency be established, it was not continuing, and that there was no authority to serve the summons upon Winchester when the service was attempted,—a year and a half after the policy was issued. The case of Stevens v. Insurance Co. (Wis.) 51 N. W. 555, is relied upon as supporting that claim. We do not think it is an authority in point. It refers to the effect of knowledge by an agent of an incumbrance on the insured property created 11 months after the insurance was effected, and it was held that an incumbrance existing at the time the application for insurance was made, if known to the agent, would not have rendered the policy invalid, but that his agency was not of such a character that knowledge by him of a subsequent incumbrance would affect the company. A statute of Wisconsin provides that

the summons in an action against an insurance company not organized under the laws of that state may be served on "any agent of such corporation, within the definition of section 1977, in the state." Rev. St. § 2637, subd. 9. Winchester was an agent, within the definition of that section, in the issuing of the policy in question, "to all intents and purposes." Those purposes included being served with a summons in an action on the policy.

3. The defendant has urged numerous objections to the judgment which do not appear to have been considered by the district court. The judgment was based upon two conclusions of law found by that court, which are stated as follows: "First. That the service of the summons upon said E. H. Winchester, as found herein, did not give and confer upon the said circuit court of Milwaukee county, Wisconsin, jurisdiction of the defendant herein to render the judgment for the enforcement of which this action is brought. Second. That the judgment for the enforcement of which this action is brought was rendered without jurisdiction of the defendant being first had and obtained by the said circuit court of Milwaukee county, Wisconsin, and is therefore null and void." No appeal has been taken by the appellee, and therefore we do not decide any question not involved in the conclusions of law stated. There is no conflict in the evidence in regard to the matter pertaining to the questions decided by the district court, and the conclusions to be drawn from that evidence are of law. Since the court erred in its conclusion, its judgment is reversed.

FRED MILLER BREWING CO. v. CAPITAL INS. CO.

Supreme Court of Iowa. May 27, 1895. 63 N. W. 568.

Appeal from district court, Polk county; Stephen F. Balliett, Judge.

Action at law upon a judgment against the defendant ren-

dered by a court of the state of Wisconsin. A jury was impaneled, but before the submission of the cause the jury was discharged by agreement of the parties, and the cause was submitted to the court. It found for the defendant, and rendered judgment in its favor for costs. The plaintiff appeals. Reversed.

Dudly & Coffin, for appellant. Read & Read, for appellee.

Robinson, J. The controlling questions in this case are the same as those involved in the case of Fred Miller Brewing Co. v. Council Bluffs Ins. Co. (decided at the present term of this court) 63 N. W. 565. The defendant is a corporation of this state engaged in doing a fire insurance business. The judgment upon which this action was founded was rendered for loss by fire of property in the state of Wisconsin, which was covered by a policy of insurance issued by the defendant. The property owner was J. M. Maier; the policy was obtained at the instance of E. H. Winchester, an agent who resided in Clarke county, in the state of Wisconsin. He obtained it through W. W. Caldwell, an insurance broker of Chicago, and he procured it of E. T. Marshall & Co., who were the general agents of the defendant in Chicago, with power to issue policies on risks in the state of Wisconsin. After the destruction of the property, an action on the policy was commenced against the defendant in the circuit court of Milwaukee county, in the state of Wisconsin, and the summons was served upon Winchester. A judgment was rendered by default against the defendant, and the plaintiff seeks to recover the amount of that judgment. The facts in this case are so nearly identical with those which controlled in the case referred to that the decision in that case is controlling in this. The district court did not make any finding of facts, nor announce any conclusion of law, in this case, but the jurisdiction of the Wisconsin court to render the judgment in suit was the question of chief importance, to which all others were subordinate, and in regard to it there was no conflict in the evidence. For the reasons stated in the case against the Council Bluffs Insurance Company the judgment of the district court is reversed.

HOOPER v. PEOPLE OF STATE OF CALIFORNIA.

Supreme Court of United States. January 7, 1895. 155 U. S. 647.

Hooper was convicted of a misdemeanor. The conviction was affirmed by the Superior Court of California. Writ of error by the Supreme Court of the United States.

The facts were stated as follows:

"That the firm of Johnson & Higgins are average adjusters and insurance brokers, residing and having their principal place of business in the city of New York, state of New York.

"That as insurance brokers they procure for other persons, of whatever state resident, and on the request of such persons, insurance on ships and vessels, cargoes and freights, from insurance companies not incorporated under the laws of the state of California, or doing business therein as provided by the laws of said state.

"That they receive from said companies the marine policies issued by said companies so insuring said ships or vessels, and deliver them to the party or parties for whom they have procured the same.

"That the said firm of Johnson & Higgins, at all the times herein mentioned, had a place of business in the city and county of San Francisco, State of California, and that the defendant had at all the times herein mentioned charge of said business as the employé and agent of said Johnson & Higgins, and not otherwise.

"That on the 13th day of March, 1888, C. W. Mott, a resident of the state of California, inquired of said defendant if he, the said defendant, as the agent of Johnson & Higgins, could procure the said Johnson & Higgins to place a certain amount of insurance on the steamer 'Alliance' of San Francisco, at a certain named rate of premium; to which said defendant replied he would see what could be done in respect to the same.

"That thereupon the said defendant informed Johnson & Higgins of the inquiry of said Mott, and requested them to advise him, the said defendant, of what, if anything, they had

done or could do in the premises; that in compliance with the said request of the said defendant, said Johnson & Higgins telegraphed to said defendant as follows:

" 'Alliance, four thousand dollars, done in American form,' but did not advise said defendant of the name of the company in which said insurance had been placed.

"The contents of the telegram above named were communicated by the defendant to said Mott. In April, 1888, said firm of Johnson & Higgins forwarded, to the said defendant the policy of the 'China Mutual Insurance Company,' insuring four thousand dollars on said steamer 'Alliance.'

"Said insurance company not then and there being a company incorporated under the laws of the state of California, and not then and there having by itself or its agent filed the bond required by the laws of the said state of California relating to insurance, this policy was delivered by the defendant to said Mott, and thereupon said Mott paid to the said defendant, as agent of Johnson & Higgins, the premium for said insurance. This premium was deposited by the defendant in a bank in San Francisco to the credit of Johnson & Higgins, and Johnson & Higgins were duly advised by him that said premium had been collected, and the amount deposited in the bank to their credit.

"All the said verbal acts by said Mott and also of said defendant, and all acts of defendant as agent in said procuring, were done in the city and county of San Francisco, state of California."

On the foregoing statement the judgment below was affirmed upon the ground "that the facts, as they appear of record herein, bring the act of defendant within the true intent and meaning of section 489 of the Penal Code of the state of California," and that "on the facts in this case said act is not repugnant to any of the provisions of the constitution of the United States."

Mr. Justice White, after stating the case, delivered the opinion of the court.

The principle that the right of a foreign corporation to engage in business within a state other than that of its creation depends solely upon the will of such other state has been

long settled, and many phases of its application have been illustrated by the decisions of this court. Bank v. Earle, 13 Pet. 519; Insurance Co. v. French, 18 How. 404; Society v. Coite, 6 Wall. 594; Provident Institution v. Massachusetts, Id. 611; Hamilton Co. v. Massachusetts, Id. 632; Paul v. Virginia, 8 Wall. 168; Ducat v. Chicago, 10 Wall.. 410; State Tax on Railway Gross Receipts, 15 Wall. 284; Railroad Co. v. Peniston, 18 Wall. 5; Delaware Railroad Tax Case, Id. 206; State Railroad Tax Cases, 92 U. S. 575; Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118; California v. Southern Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593; Maine v. Grand Trunk R. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163; Ashley v. Ryan, 153 U. S. 445, 14 Sup. Ct. 865.

While there are exceptions to this rule, they embrace only cases where a corporation created by one state rests its right to enter another and to engage in business therein upon the federal nature of its business,—as, for instance, where it had derived its being from an act of congress, and has become a lawful agency for the performance of governmental or quasi governmental functions, or where it is necessarily an instrumentality of interstate commerce, or its business constitutes such commerce, and is, therefore, solely within the paramount authority of congress. In these cases the exceptional business is protected against interference by state authority. The reasons upon which the exceptions to the general rule are based have been often explained. Telegraph Co. v. Texas, 105 U. S. 460; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 205, 211, 5 Sup. Ct. 826; Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 342, 7 Sup. Ct. 1118; McCall v. California, 136 U. S. 104, 110, 10 Sup. Ct. 881; Norfolk & W. R. Co. v. Pennsylvania, 136 U. S. 114, 118, 10 Sup. Ct. 958; Pickard v. Car Co., 117 U. S. 34, 6 Sup. Ct. 635; Robbins v. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. 1380; Asher v. Texas, 128 U. S. 129, 9 Sup. Ct. 1; Stoutenburgh v. Hennick, 129 U. S. 141, 9 Sup. Ct. 256; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851.

In the case last cited the precedents were fully reviewed, and the governing reasons of the law upon this subject were clearly elucidated.

The contention here is that, inasmuch as the contract was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority, and included among the exceptions to the general rule. This proposition involves an erroneous conception of what constitutes interstate commerce. That the business of insurance does not generically appertain to such commerce has been settled since the case of Paul v. Virginia, supra. See, also, Philadelphia Fire Ass'n v. New York, 119 U. S. 110, 7 Sup. Ct. 108, and authorities there cited.

While it is true that in Paul v. Virginia, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of insurance of any kind constituted interstate commerce. The court, in reaching its conclusion upon this question, was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon a broad analysis of the nature of interstate commerce, and of the relation which insurance contracts generally bear thereto. Thus, in Paul v. Virginia, the court, speaking through Mr. Justice Field, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simply contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed

contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

This language was reiterated in the case of Philadelphia Fire Ass'n v. New York, supra. In Crutcher v. Kentucky, supra, the court, in applying the exception to the general rule, held that the state of Kentucky was without power to prevent a corporation engaged in interstate commerce from entering that state and carrying on its business therein, and also pointed out the distinction between the making of contracts of insurance and interstate commerce, or the necessary instrumentalities thereof, as follows: "The case is entirely different for that of foreign corporations seeking to do a business which does not belong to the regulating power of congress. The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous."

It is evident, then, as we have said above, that the attempt to so distinguish between policies of marine insurance and policies of fire insurance as to reach the deduction that there is a constitutional difference between the business of a corporation issuing policies of one kind and that of a corporation dealing in policies of the other kind, which affects the question of a state's authority to control the business of either, is based upon a fundamental misconception of the nature of the constitutional provision relied upon. It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce, or an instrumentality thereof, on the one side, and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been

carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which such commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature.

The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against "the perils of the sea."

The state of California has the power to exclude foreign insurance companies altogether from her territory, whether they were formed for the purpose of doing a fire or a marine business. She has the power, if she allows any such companies to enter her confines, to determine the conditions on which the entry shall be made. And as a necessary consequence of her possession of these powers, she has the right to enforce any conditions imposed by her laws as preliminary to the transaction of business within her confines by a foreign corporation, whether the business is to be carried on through officers or through ordinary agents of the company; and she has also the further right to prohibit a citizen from contracting within her jurisdiction with any foreign company which has not acquired the privilege of engaging in business therein, either in his own behalf or through an agent empowered to that end. The power to exclude embraces the power to regulate, to enact and enforce all legislation in regard to things done within the territory of the state which may be directly or incidentally requisite in order to render the enforcement of the conceded power efficacious to the fullest extent, subject always, of course, to the paramount authority of the constitution of the United States.

In the argument at bar it was admitted that, if the contract is to be considered as made in California, then this case is governed by the foregoing principles, unless the business of

a foreign company writing marine insurance is protected by the interstate commerce clause of the constitution; which, as we have seen, is not the case.

It is claimed, however, that, irrespective of this clause, the conviction here was illegal—First, because the statute is by its terms invalid, in that it undertakes to forbid the procurement of a contract outside of the state; and, secondly, because the evidence shows that the contract was in fact entered into without the territory of California. The language of the statute is not fairly open to this construction. It punishes "every person who in this state procures or agrees to procure for a resident of this state any insurance," etc. The words "who in this state" cannot be read out of the law in order to nullify it under the constitution.

It is urged that the words, "every person who agrees to procure for a resident of this state," are inconsistent with the preceding language, "who in this state procures," etc. The argument is this: The act punished is procuring for a resident. In order to procure for another, the procurer must be agent of such other; hence the contract of insurance was procured by the agent of the insured, and not by the agent of the foreign company; and, inasmuch as the foreign company was not, and under the law could not be, technically, within the state for the purpose of giving its assent to the contract, the insurance must have been procured without the state. The fallacy here is ingenious, but it is easily exposed. The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. Parsons v. Bedford, 3 Pet. 433; U. S. v. Coombs, 12 Pet. 72; Brewer's Lessee v. Blougher, 14 Pet. 178; Supervisors v. Brogden, 112 U. S. 261, 5 Sup. Ct. 125; Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580.

The admission that the insurance was procured for the resident from a foreign company which had no agent in the state does not exclude the possibility of its having been procured within the state. If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the state, and be covered by the statute.

The business of a broker is to serve as a connecting link

between the party who is to be insured and the party who is to do the insuring,—to bring about "the meeting of their minds" which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent. How v. Insurance Co., 80 N. Y. 32; Insurance Co. v. Young, 111 Mass. 537; Insurance Co. v. Reynolds, 36 Mich. 502.

Domat thus defines his functions: "The engagement of a broker is like to that of a proxy, a factor, or other agent, but with this difference: that the broker, being employed by persons who have opposite interests to manage, he is, as it were, agent both for the one and the other, to negotiate the commerce and affair in which he concerns himself. Thus his engagement is twofold, and consists in being faithful to all the parties in the execution of what every one of them intrusts him with. And his power is not to treat, but to explain the intentions of both parties, and to negotiate in such a manner as to put those who employ him in a condition to treat together personally." 1 Dom. (Strahan's Translation) bk. 1, tit. 17, § 1.

Story says this statement of the functions of a broker is "a full and exact description according to the sense of our law." Story, Ag. (9th Ed.) p. 31, note 3.

If the contention of the plaintiff in error were admitted, the established authority of the state to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have an understanding with a resident that in the effecting of contracts between itself and other residents of the state he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a state government depend, not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable.

The facts found here enforce the correctness of these views, and illustrate the evil which the statute was doubtless intended to prevent.

Johnson & Higgins were average adjusters and brokers in New York City. Hooper, the plaintiff, as their agent, had a place of business in San Francisco. As such broker he applied for the insurance to his principals in New York City. The policy came to San Francisco for delivery, and the premium was there paid.

One more contention remains to be noticed. It is said that the right of a citizen to contract for insurance for himself is guarantied by the fourteenth amendment, and that, therefore, he cannot be deprived by the state of the capacity to so contract through an agent. The fourteenth amendment, however, does not guaranty the citizen the right to make within his state, either directly or indirectly, a contract, the making whereof is constitutionally forbidden by the state. The proposition that, because a citizen might make such a contract for himself beyond the confines of his state, therefore he might authorize an agent to violate in his behalf the laws of his state within her own limits, involves a clear non sequitur, and ignores the vital distinction between acts done within and acts done beyond a state's jurisdiction.

Judgment affirmed.

Mr. Justice Harlan (dissenting).

Hooper, the plaintiff in error, was the agent at San Francisco of the firm of Johnson & Higgins, average adjusters and insurance brokers, doing business in the city of New York. In the latter capacity that firm procured for its customers, from insurance companies wherever incorporated, insurance on ships, vessels, cargoes, and freights.

C. W. Mott, a resident of California, inquired of Hooper if he could procure a certain amount of insurance on a vessel named the Alliance at a given rate of premium, no particular company being specified by Mott. Hooper communicated with his principals, and the latter telegraphed in reply, "Alliance, four thousand dollars, done in American form," but did not name the company in which the insurance had been placed. Mott was informed of this telegram. Johnson & Hig-

gins procured and forwarded to Hooper a policy of the China Mutual Insurance Company of Boston insuring the Alliance in the above sum. Hooper delivered it to Mott, the latter paying to the former, as agent of Johnson & Higgins, the amount of the premium. That amount was deposited in bank at San Francisco to the credit of Johnson & Higgins, the latter being notified of the deposit.

On account of what he did, as above stated, Hooper was prosecuted under a statute of California, which provided that "every person who in this state procures or agrees to procure any insurance for a resident of this state from any insurance company not incorporated under the laws of this state, unless such company or its agent has filed the bond required by the laws of this state relative to insurance, is guilty of a misdemeanor." Pen. Code, § 439.

The bond referred to is that prescribed by section 623 of the Political Code of California, which makes it the duty of the insurance commissioner to require ever company, association, or individual, not incorporated under the laws of California, "and proposing to transact insurance business by agent or agents in this state," before commencing such business, to file a bond, with sureties, in the penal sum of $2,000, conditioned that the person or firm, agent or officer, named therein, would pay to the treasurer of the county or city and county in which the principal office of the agency is located such sum per quarter, payable in advance, for a license to transact an insurance business, or such other license as may be imposed by law, so long as the agency remains in the hands of the person or firm, officer or agent, named as principal in the bond; and that such person or firm, officer or agent, would pay to the state all stamp or other duties on the gross amounts so insured, inclusive of renewals on existing policies, and conform to all the provisions of the revenue and other laws made to govern them.

It is true, as stated in the opinion just delivered, that this court has held that a state may prescribe the conditions upon which the corporations of other states, not engaged in interstate commerce, may do business within its jurisdiction; indeed, may exclude such corporations altogether from its limits.

In Paul v. Virginia, 8 Wall. 178, it was adjudged that a corporation was not a citizen within the meaning of the clause of the constitution declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, although, for purposes of suit in the courts of the United States, it must be deemed a citizen of the state under whose laws it was created. But no question like the one involved in that case is now presented for decision. There is no question here as to the rights of individual citizens of California and of New York.

Section 623 of the Political Code of California applies only to insurance companies not incorporated under the laws of that state, and "proposing to transact business" within its limits. The statement of the case on appeal shows that defendant had charge of the business of Johnson & Higgins, at San Francisco, as their employé and agent, and not otherwise. There is no suggestion in that statement that the China Mutual Insurance Company of Boston proposed to do business in California by agent; nor is it stated that Johnson & Higgins are or ever claimed to be agents of that company, nor that that company ever recognized them as its agents, or ever issued to a resident of California any policy of insurance except the one delivered to Johnson & Higgins, and which that firm obtained and forwarded to Hooper, and by the latter was delivered to Mott. This single act of the company cannot be held to prove that it proposed to transact business in that state, or that it contemplated the issuing of any other policy to a resident of California. In Manufacturing Co. v. Ferguson, 113 U. S. 727, 734, 5 Sup. Ct. 739, this court, referring to a statute of Colorado forbidding foreign corporations from doing business there, except upon complying with certain regulations, said that it did not embrace a single or isolated transaction by a foreign corporation. Indeed, the prosecution in the present case manifestly had in mind the difference between a single act of insuring property and "proposing to transact insurance business by agent or agents"; for, as will be seen, the complaint under which Hooper was prosecuted does not allege, and, as I infer, purposely failed to allege, that the company which issued the policy in question proposed

to transact business in California. So that we have before us a statute making it a crime to procure, or agree to procure, in California, for a resident of that state, a policy of insurance from a foreign corporation which does not propose to do business there by agents, and, so far as appears, has never issued to a resident of California any policy but the one issued to Mott.

In my opinion, the statute, in its application to the case now presented, is an illegal interference with the liberty both of Mott and of Hooper, as well as an abridgment of the privileges, not of a foreign corporation, but of individual citizens of other states through whom the policy in question was obtained. Johnson & Higgins are pursuing one of the ordinary callings of life in the city of New. York. It is a lawful calling, as much so as that of a merchant, grocer, manufacturer, tailor, or shoemaker. It cannot properly be characterized as in itself or by the necessary results of the business hurtful to the community. They have as much right to pursue their calling in California, by agent, as they have to pursue it in New York. Of course, this calling—indeed every calling of life—is subject to the power of the state within whose limits it is pursued, to regulate it in any mode that does not violate the essential rights of liberty and property guarantied by the federal constitution against hostile state action. If it were conceded that California could require every one acting within its limits as an agent for others, whether insurance brokers, merchants, grocers, manufacturers, tailors, or shoemakers, to take out a license and pay a tax as such agent, —such regulations being made applicable, in similar circumstances, to all agents doing business in California,—it would not follow that it could absolutely prohibit individual citizens of other states or its own people from conducting there, by agents, an ordinary calling not in itself immoral or dangerous to the public. The enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade is an essential part of liberty, as guarantied by the fourteenth amendment. Powell v. Pennsylvania, 127 U. S. 678, 684, 8 Sup. Ct. 992, 1257. Among the inalienable rights possessed by American citizens is, as

Mr. Justice Field has said, "the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment." Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co., 111 U. S. 757, 4 Sup. Ct. 652. And in the same case Mr. Justice Bradley said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." So in Jacob's Case, 98 N. Y. 99, 106: "One may be deprived of his liberty and his constitutional rights without the actual imprisonment or restraint of his person. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

In many states there are individuals or firms whose business it is to negotiate loans for others. Often, if not generally, the money is in the hands of corporations for investment. These corporations may not have agents outside of the state in which they are located. What would be thought of a statute making it a crime for any one in the state which enacted it to procure for one of its residents, and through a firm of brokers in New York, a loan of money from a corporation of another state, that did not propose to do business by agent, or elsewhere than at the place of its creation? The state, it may be, could forbid any foreign corporation whose business it is to invest money for itself and others, from doing business in California by agent, or could require, as a condition of its doing business there by agent, that the corporation or agent should give such bond with surety, as may be prescribed. But it could not be made a crime for one in that state to procure a loan of money for a resident of that state, through individual citizens of another state, although the money should be obtained from a foreign investment company not proposing to transact business by agent in the state

where the borrower resides, and from which the application to borrow comes. And yet the principle which the court approves in its opinion would seem to justify the contrary view.

Mott, for whom Hooper acted, could not be compelled to restrict his application for insurance to foreign companies doing or proposing to do business in California, and which had filed the bond required by the statute of that state. If he preferred insurance in a company that had no agent in California, he had a right to that preference; and any interference with its free exercise would infringe his liberty. Suppose he had himself applied, by mail, directly to Johnson & Higgins for insurance on his vessel, and that firm had delivered the policy in question to an express company, with directions to deliver it to Mott. Or suppose that Mott had made his application, by mail, directly to the company. I cannot believe that a statute making his conduct in either of the cases supposed a criminal offence, would be sustained as consistent with the constitutional guaranties of liberty. But it seems from the opinion of the court that a state is at liberty to treat one as a criminal for doing for another that which the latter might himself do of right, and without becoming a criminal. In my judgment, a state cannot make it a crime for one of its people to obtain, himself or through the agency of individual citizens of another state, insurance upon his property by a foreign corporation that chooses not to enter the former state by its own agents.

The chief vice in the argument of counsel in support of the California statute is found in the assumption that Hooper, as well as his principals, Johnson & Higgins, acted as agents of the insurance company. That assumption is unwarranted by the facts. Hooper was the agent of Johnson & Higgins, and in that capacity alone acted for Mott. What he said and did in California was said and done for his principals. Neither Johnson & Higgins nor Hooper acted as agents for the insurance company. The transaction, in legal effect, is the same as it would have been if Mott had himself applied by mail to Johnson & Higgins for insurance, and had received the policy from them by mail or through some one in California

to whom it was intrusted by that firm for delivery to him. If California could forbid Mott himself to obtain, by mail, a policy from a foreign corporation having no agent or representative of its own in California, and make it a crime for him to do so, then the statute in question is not repugnant to the constitution of the United States. But, in my judgment, the power of excluding foreign corporations from doing business within its limits, by agents, cannot be exerted by the state so as to impair or destroy the constitutional rights of its own people or of citizens of other states. I think the judgment of the court below should be reversed.

Mr. Justice Brewer concurs in this opinion. Mr. Justice Jackson, now absent, participated in the consideration of this case. This opinion has been submitted to him, and he concurs in the views here expressed.

Accord. Seamans v. Knapp, Stout & Co., 89 Wis. 171, 61 N. W. 757; Paul v. Virginia, 8 Wal. (U. S.) 168; Continental Life Ins. Co. v. Chamberlain, 132 U. S. 304; Indiana Millers Mut. Fire Ins. Co. v. People, 65 Ill. App. 355; Parker v. Lamb, 99 Iowa 265, 68 N. W. 685; State v. Stone, 118 Mo. 388.

CHAPTER VI.

LIFE INSURANCE STOCK AND MUTUAL COMPANIES.

LORD v. DALL.

Supreme Court of Massachusetts, 1815. 12 Mass. 115.

Legality of Life Insurance.

Parker, C. J., delivered the opinion of the court.

It has been made a question in the argument, whether a policy of assurance upon a life is a contract which can be enforced by the laws of this State: the law of England, as it is suggested, applicable to such contracts never having been adopted and practised upon in this country.

It is true that no precedent has been produced from our own records of an action upon a policy of this nature. But whether this has happened from the infrequency of disputes which have arisen, it being a subject of much less doubt and difficulty than marine insurances, or from the infrequency of such contracts, it is not possible for us to decide. By the common principles of law, however, all contracts fairly made, upon a valuable consideration, which infringe no law, and are not repugnant to the general policy of the laws, or to good morals, are valid and may be enforced, or damages recovered for the breach of them.

It seems that these insurances are not favored in any of the commercial nations of Europe except England; several of them having expressly forbidden them, for what reasons, however, does not appear; unless the reason given in France is the prevailing one, viz.: "That it is indecorous to set a price upon the life of man, and especially

a freeman, which, as they say, is above all price." It is not a little singular that such a reason should be advanced for prohibiting these policies in France, where freedom has never been known to exist, and that it never should have been thought of in England, which for several centuries has been the country of established and regulated liberty.

This is a contract fairly made; the premium is a sufficient consideration; there is nothing on the face of it which leads to the violation of law; nor anything objectionable on the score of policy or morals. It must, then, be valid to support an action, until something is shown by the party refusing to perform it in excuse of his non-performance.

It is said that, being a contract of assurance, the law on the subject of marine insurance is applicable to it; and therefore unless the assured had an interest in the subject matter insured, he is not entitled to his action.

This position we agree to; for otherwise it would be a mere wager policy, which we think would be contrary to the general policy of our laws, and therefore void. Had then the plaintiff an interest in the life of her brother which was insured?

The report states the facts upon which that interest was supposed at the trial to exist. The plaintiff, a young female without property, was and had been for several years supported and educated at the expense of her brother, who stood towards her in loco parentis. Nothing could show a stronger affection of a brother towards his sister than that he should be willing to give so large a sum to secure her against the contingency of his death, which would otherwise have left her in absolute want. One per cent per month upon $5,000, taken on the life of a man of thirty-three years of age, in good health at the time, was a sufficient inducement to the underwriter to take at least common chances and proved the strong disposition of the brother to secure his sister against the melancholy consequence to her of his death. In common understanding no one would hesitate to say, that in the life of such

a brother the sister had an interest; and few would limit that interest to the sum of five thousand dollars.

But it is said the interest must be a pecuniary, legal interest, to make the contract valid; one that can be noticed and protected by the law: such as the interest which a creditor has in the life of his debtor, a child in that of his parent, etc. The former case, indeed, of the creditor would have no room for doubt. But with respect to a child, for whose benefit a policy may be effected on the life of the parent, the interest, except the insurable one which may result from the legal obligation of the parent to save the child from public charity, is as precarious as that of a sister in the life of an affectionate brother. For if the brother may withdraw all support, so may the father, except as before stated. And yet a policy effected by a child upon the life of a father, who depended on some fund terminable by his death to support the child, would never be questioned: although much more should be secured than the legal interest which the child had in the protection of his father. Indeed, we are well satisfied that the interest of the plaintiff in the life of her brother is of a nature to entitle her to insure it. Nor can it be easily discerned why the underwriters should make this a question after a loss has taken place, when it does not appear that any doubts existed when the contract was made; although the same subject was then in their contemplation.

Perceiving nothing in this contract unfriendly to the morals or interests of the community, and no knowledge of an illegal intention being imputed to the plaintiff, we see no reason for setting aside the verdict. Judgment will therefore be entered upon it.

BARNES v. LONDON, EDINBURGH, AND GLASGOW LIFE INS. CO.

Queen's Bench Division, 1891. '92. 1 Q. B. 864.

Insurable Interest.

Lord Coleridge, C. J. I am of opinion that this appeal must be dismissed. The facts are simple. The person insured was a little girl of ten, and the plaintiff, who effected the insurance for her own benefit, was her stepsister; the child had no mother, though her father was apparently alive; this is, however, not clear upon the evidence. The evidence of the plaintiff was to the effect that she had promised her mother that she would maintain and keep the child; and there was evidence that she had undertaken that burden. That was a duty not cast upon her by law, but wholly self-imposed; and in carrying out her undertaking the plaintiff might have had to pay for the education and maintenance of the child, possible also for its burial. In that state of circumstances it is said that the plaintiff had no insurable interest in the child's life. Now, I agree that the insurable interest must be a pecuniary interest, and that the interest must be in existence at the time when the policy is effected; that is perfectly clear upon the authorities. Is there such a pecuniary insurable interest here? I think there is. The expenses to which the plaintiff undertook to put herself for the maintenance of the child were, as I have said, not expenses which she was bound to incur; and in my judgment the plaintiff undoubtedly had an insurable interest in the child's life so far as to secure the repayment of the expenses incurred by her. I cannot find that anything has been said in any case to a contrary effect. Taking the ordinary course of business as the guide to determine the law I should have thought that it was matter of common knowledge that obligations of this sort were obligations the repayment of which was habitually secured in this way. In my judgment the plaintiff had an insurable

interest in the child's life, at least up to the amount of the payments actually made by her on the child's account. No point was taken before the county court as to whether any money had been paid by the plaintiff, or as to the amount, if any, paid by her. The question of amount is, therefore, not before us; and on the point of law we must uphold the judgment of the county court judge.

A. L. Smith, J. I am of the same opinion. No doubt the contention of the defendants is correct, that unless the plaintiff had a pecuniary interest in the child's life at the time the contract of insurance was made, the policy would be void under the provisions of the statute. I think, however, that the plaintiff had such an interest. A man can insure the life of his debtor. For instance, suppose an agreement by a debtor to pay his creditor 1,000 pounds by successive monthly instalments of 100 pounds, the creditor could insure his debtor's life, and at his death recover in an action on the policy against the insurance company. In the present case there is sufficient evidence of an undertaking on the plaintiff's part to incur expenses in maintaining, bringing up, and perhaps in burying the child. This decision does not trench on the cases in which it has been held that a father has no insurable interest in the life of his son. There is an obligation in law on a father to maintain his son; there is no such obligation here, but an undertaking to incur expense; and I can see no reason why the plaintiff, having incurred and incurring such expense, has not a pecuniary insurable interest to the extent of each sum of money as it was successively expended by her for the child's benefit—of course, so long as the total amount does not exceed the amount of the policy. We have nothing to do with the question of amount expended, which point was not taken below; the sole point is whether the plaintiff had any pecuniary interest at the date of the policy, and of that there was evidence. The appeal must be dismissed. Appeal dismissed.

RESERVE MUTUAL INSURANCE CO. v. CANE.

Supreme Court of Pennsylvania, 1876. 81 Pa. St. 154.

Insurable Interest, Son in Father's Life.

The policy was issued on request of James P. Cane on the life of his father, John Cane. John Cane died on the 26th day of June, 1872. The father had come from Ireland, and lived in this country two or three years before his death. The plaintiff had paid $120 for bringing his father and family to this country. Of this amount, he had been repaid $50. The father intended to pay him, but the plaintiff had paid the expenses through the love and affection he had for the father, expecting that he would be reimbursed by the father, or other members of the family. The defense was no insurable interest. The court held:

Per Curiam. By the 28th section of the Poor Law of June 13th, 1876, the father and grandfather, and the mother and grandmother, and the children and grandchildren of every poor person not able to work, shall, at their own charge, being of sufficient ability, relieve and maintain such poor person, at such rate as the Court of Quarter Sessions of the proper county shall order and direct. Maintenance of a father or mother unable to work is, therefore, a legal liability. When we add to this the feelings of natural affection and the desire produced by these feelings to provide for the comforts of parents, the right to effect an insurance on the life of the parent, to carry out these purposes, ought not to be denied. It would be technical in the extreme to say that a son has no insurable interest in his father's life. Poverty may overtake the father in his lifetime, and thus both father and mother be cast upon the son; or if the father die before her, the necessity may fall at once upon the son. Why then should he not be permitted to make a provision, by insurance, to reimburse himself for his outlays, past or future? What injury is done to the insurance company?

They receive the full premium, and they know, in such case, from the very relationship of the parties, that the contract is not a mere gambling adventure, but is founded in the best feelings of our nature, and on a legal duty which may arise at any time. We are of opinion that the policy is not void. Judgment affirmed.

LOOMIS ADMR. v. EAGLE L. & H. INS. CO.

Supreme Court of Mass. 72 Mass. 396.

Insurable Interest, Father in Son's Life.

Shaw, C. J. We understand that the law of Connecticut (where the parties resided) is similar to that of Massachusetts, and that by the law of both States a father who supports, maintains and educates a son, under twenty-one years of age and not emancipated, is entitled to the earnings of such son, and may maintain an action for them. * * *

But, upon broader and larger grounds, we are of opinion that, independently of the fact that the son was a minor, and the assured had a pecuniary interest in his earnings, the assured had an insurable interest sufficient to maintain this action. * * *

In discussing the question in this commonwealth, we are to consider it solely as a question at common law, unaffected by the St. of 14 G. 3, C. 48, passed about the time of the commencement of the Revolution, and never adopted in this state. All therefore which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is that the insured has some interest in the life of the cestui que vie; that his temporal affairs, his just hopes and well-grounded expectations of support, of patronage, and advantage in life will be impaired; so that the real purpose is not a wager, but to secure such advantages, supposed to depend on the life of

another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount, and whether the insurance be to a large or small amount, the premium is computed to be a precise equivalent for the risk taken. Perhaps it would be difficult to lay down any general rule as to the nature and amount of interest which the assured must have. One thing may be taken as settled, that every man has an interest in his own life to any amount in which he chooses to value it, and may insure it accordingly.

We cannot doubt that a parent has an interest in the life of a child, and vice versa, a child in the life of a parent; not merely on the ground of a provision of law that parents and grandparents, children and grandchildren, are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred operating often more efficaciously than those of positive law.

We believe it is now conceded, that before that statute a policy on life was good at common law, and that the object of that statute was to prohibit wager policies. That it was not a declaratory act, but introduced a new law, was decided in the Irish court of Exchequer Chamber, in British Ins. Co. v. Magee, Cook & Alcock, 182, approved and confirmed by the case hereafter stated.

In this state of the question, the case of Godsall v. Boldero, 9 East, 72, was decided, in 1807. It was a policy upon the life of Mr. Pitt; in favor of the plaintiffs, coachmakers, to whom he was largely indebted; after Mr. Pitt's death, by the gratuitous act of the nation, a fund was raised by act of parliament, and furnished to the executors, by whom the plaintiffs were paid their debt. That case was decided in favor of the defendants, on the specific ground that the policy was in effect a security for the payment of the debt only; that if the debt was fully paid

by the executors, either from the assets of the deceased, or from funds gratuitously furnished them, it put an end to all claim of loss on the policy.

We now come to the case of Dalby v. India & London Life Assurance Co., decided in the Exchequer Chamber, 15 C. B. 365. By that case, Godsall v. Boldero is directly drawn in question and overruled. It decides that a policy of life insurance is not a contract of indemnity, but a contract in a certain event to pay a certain sum in consideration of an annual premium; that when a policy effected by a creditor on the life of his debtor is valid at the time it is entered into, the ceasing of that interest before the death does not invalidate the insurance under St. 14 G. 3, C. 48.

Prima facie the plaintiff in the present case has an interest in the life of his son, the policy of insurance was a valid one, and the plaintiff is entitled to recover upon it. Exceptions overruled.

Accord. Valley Mut. Life Ass'n v. Teewalt, 79 Va. 421.

RITTLER v. EMELIE SMITH, ADMX.

Court of Appeals of Maryland, 1889. 70 Md. 261.

Insurable Interest, Creditor.

Miller, J. In June, 1886, Victor Smith was indebted to William H. Rittler in the sum of about $1,000 and Smith being insolvent, Rittler took out certificates of insurance on Smith's life, in four several mutual aid associations, aggregating on their face the sum of $6,500. These certificates were all in favor of Rittler and he paid all the premiums or assessments thereunder. Smith died in March, 1887, and Rittler collected from these insurances the sum of $2,124.82, which appears to have been all that could have been collected, according to the terms of the

certificates and the financial condition of the associations. Deducting from this sum the debt and interest due Rittler, the premiums he had paid, and the costs and expenses of effecting the insurances, there remained a balance of $174.53, as of the 1st of June, 1887. On the third of October, following letters of administration on Smith's estate were granted to an administratrix, who thereupon filed her bill claiming this balance as belonging to the estate of the decedent. In his answer Rittler denied this claim, and insisted that the money belonged to him. The case was heard on bill and answer, and the court below decreed in favor of the complainant. From this decree Rittler has appealed.

The question as thus presented is an interesting one, is of first impression in this State, and has been very ably argued. On the part of the appellant it is contended that where a creditor with his own money and for his own account, effects and keeps up an insurance on the life of his debtor, the whole of the proceeds belong to him unless it appears that he has gone into it for the mere purpose of speculation, which in this case is expressly negatived by the answer, the averments of which must be taken as true, the case having been heard on bill and answer. On the other hand, counsel for the appellee contend that where the creditor receives more than enough to reimburse him for his debt and outlay, with interest, he will, as to the balance, be regarded as a trustee for the personal representative of the debtor; that the law says to the creditor in such a case, "you may protect yourself; you may by insuring your debtor's life secure your debt with all outlay and expenses; you may make yourself whole, but you shall not speculate on his death; you shall not have a greater direct pecuniary interest in his death than you may have in his life."

There have been numerous decisions upon this subject, some of which are conflicting. On many points, however, bearing upon the question, there is a general concurrence of judicial opinion and authority. For instance, it is generally held by the courts in this country that one who has

no insurable interest in the life of another cannot insure that life. Such insurances are considered gambling contracts, and for that reason void at common law apart from any statute forbidding them. In England they were held valid at common law, but were prohibited as introducing a "mischievous kind of gaming," by the first section of statute 14 Geo. III, cp. 48. The effect of this section, as construed by the English courts, is to make the law of England, by Act of Parliament, the same as it has been held to be by the courts in this country without such an act. In some American cases they have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not related or connected by consanguinity or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty for such a crime. This doctrine carried to its logical result has a far-reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator.

It makes void every similar limitation in remainder after the death of a life tenant. Every like conveyance of property in consideration that the grantee shall support the grantor during his life, falls under the same condemnation. Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances in which the same result would follow from the application of this doctrine, could be readily suggested, but we need not pursue the subject further.

All the authorities also concur in holding that a creditor has an insurable interest in the life of his debtor. In England it was at one time held that though the creditor had an insurable interest at the time the policy was issued, yet if his debt was paid in the lifetime of his debtor, and his interest had therefore ceased, he could not

recover, because the contract of life insurance like insurances of property, was one of indemnity. But this doctrine has long since been repudiated, and the settled rule in England now is that a life insurance in no way resembles a contract of indemnity, but is an agreement to pay a certain sum of money upon the death of the person insured in consideration of the due payment of a certain fixed annual sum or premium, during his life, and hence if the contract be valid at the time it was entered into, notwithstanding the fact that the interest of the creditor has ceased during the life of his debtor, he may still recover on the policy, though the result may be that he will be twice paid for his debt, once by his debtor and again by recovery on the policy, Dalby v. Life Ins. Co., 15 Com. Bench, 365. The same construction of the contract has been approved and adopted by this court. Emerick v. Coakley et al., 35 Md. 193; Whiting v. Independent Mutual Ins. Co., 15 Md. 326.

In support of the view taken by the appellee's counsel, cases have been cited in which it has been held that the assignee of a life policy, who has no insurable interest in the life, stands in the same position as if he had originally taken out the policy for his own benefit. In other words, the contention is that the assured himself can make no valid absolute assignment of his policy to one who has no insurable interest in his life. But our own decisions are opposed to this. It is settled law in this State that a life insurance policy is but a chose in action for the payment of money, and may be assigned as such under our Act of 1829, c. 51, New York Life Ins. Co. v. Flack, 3 Md. 341; Whitridge v. Barry, 42 Md. 150. It is quite a common thing for the bond or promissory note of a private individual to be sold through a broker to a bona fide purchaser for less than its face value; and when the latter takes an assignment of it, without recourse, he becomes its absolute owner, and is not bound to refund to the vendor anything he may recover upon it over and above what he paid for it. So a life policy being a similar chose in action may be disposed of and

assigned in the same way, provided the assent of the insurer is obtained where it is so stipulated in the instrument. In such case, the assignee must of course keep the policy alive by the due payment of premiums if he wishes to realize anything from it. Such an assignment is valid in this State if it be bona fide business transaction, and not a mere device to cover a gaming contract. Such is also the English rule, Ashley v. Ahsley, 3 Sim. 149. These considerations prevent us from adopting some of the reasoning of the Supreme Court in Warnock v. Davis, 104 U. S. 775. It seems to us, with great deference, that from the facts in that case the association, which was the assignee, could well be regarded as standing in the same position as if it had taken out the policy in its own name, and having no insurable interest in the life, it clearly became a wager policy. The assignment was made the day after the policy was issued in pursuance of an agreement to that effect made the day of its issue. The assignment was evidently a mere device to cover up a gaming transaction. In the preceding case of Cammack v. Lewis, 15 Wallace, 643, the debt due the creditor was only $70 and the policy was for $3,000. It was taken out by the debtor, who was in bad health, at the suggestion of the creditor, and was assigned to him immediately after it was made out, he at the same time taking a note from his debtor for $3,000 confessedly without consideration. In view of these facts the court well said, "it was a sheer wagering policy and probably a fraud on the insurance company. To procure a policy for $3,000 to cover a debt of $70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him, deprives it of all pretense to be a bona fide effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get $2,000 out of the $3,000, nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack." It was "under these circumstances" that the court held that Cammack could hold the policy only as security for the debt

due him when it was assigned, and such advances as he might afterwards make on account of it.

If such then be the nature of a life insurance contract, and if a bona fide assignee for value, though a stranger, may recover and hold the whole amount for his own use, why may not a creditor who in pursuance of a bona fide effort to secure payment of his debt, insures the life of his debtor and takes the policy in his own name or for his own benefit, be entitled to hold all he can recover? He is in fact the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing in this respect. If he pays the debt to his creditor he has only discharged his duty, and what interest has he in the policy, or in what his creditor may recover upon it? In a recent English case it was held that a creditor who had insured the life of his debtor could retain all the sums he had received from the policies, without accounting for them to the representatives of the debtor, unless there was distinct evidence of a contract, to the effect that the creditor had agreed to effect the policy, and that the debtor had agreed to pay the premiums, in which case only will the policy be held in trust for the debtor, Bruce v. Garden, Law Rep., 5 Chancery Appeals, 32. This is the latest English authority to which we have been referred, and was decided by Lord Chancellor Hatherley on appeal. In that case the amount received from the policies by the creditor was nearly twice as much as the debt due him by his debtor.

We agree that there may be such a gross disproportion between the debt and the amount of the policy as to stamp the transaction as indicating upon its face want of good faith, and as a mere speculation or wager. The case of Cammack v. Lewis affords an instance of such gross disparity, but no general rule on this subject has as yet been laid down by the courts, and it is probably better to leave each case to depend on its own circumstances.

On the whole we are of opinion the weight of reason as well as of authority sustains the appellant's claim. We shall therefore reverse the decree appealed from and dismiss the appellee's bill.

Decree reversed and bill dismissed.

Note. The general principle announced in the foregoing decision has been generally sustained. The supreme court of Georgia held that a creditor had an insurable interest in the life of his debtor and that the interest included, in addition to the debt, the cost of keeping up the insurance. Exchange Bank of Macon v. Loh, 104 Ga. 446, 44 L. R. A. 372, 31 S. E. 459. Accord. Amick v. Butler, 111 Ind. 578, 12 N. E. 518; Strode v. Meyers Bros. Drug Co., 101 Mol. App. 627, 74 S. W. 379.

TRINITY COLLEGE v. TRAVELERS INS. CO. OF HARTFORD.

Supreme Court of North Carolina. Oct. 1893. 113 N. C. 244.

Insurable Interest, Religious Society as Beneficiary.

The material facts of the complaint are as follows:

"(3) That on August 23, 1893, Edward Samuel Sheppe, of Durham, County of Durham, State of North Carolina, applied to said defendant for a policy of life insurance for twelve hundred and fifty dollars upon his own life, for the benefit, as in said application expressed, of 'Trinity College, Durham, N. C., a religious corporation sustained and controlled by the Methodist Episcopal Church South, of North Carolina, of which church applicant is a member;' and that thereafter, to wit, on September 5, 1893, said plaintiff having paid the premium demanded therefor by said defendant, said defendant, in consideration of said premium, and the application therefor by said Sheppe, issued and delivered to plaintiff its policy, No. 75,658, by which it insured the life of said Sheppe for the sum of twelve hundred and fifty dollars, payable upon acceptance

by said company of satisfactory proof of his death, as therein expressed, to 'Trinity College of Durham, N. C., a religious corporation sustained and controlled by the Methodist Episcopal Church South, of North Carolina, of which church the said E. S. Sheppe is a member.' (4) That in and by said policy said defendant promised and agreed that at the time of its issue, and every subsequent year from date of issue, the cash value specified in table 'cash surrender values,' indorsed thereon, would be paid for it, provided it should be in force under its original conditions, and was legally surrendered therefor to the home office of said defendant within thirty days from the close of such period. * * * (5) That before bringing this action, and within thirty days from the date of issue of said policy, and while it was still in force under its original conditions, said plaintiff surrendered said policy to the home office of said defendant at Hartford, Connecticut, and demanded of said defendant the payment to it of the sum of two hundred and seventy-five dollars, its cash surrender value according to said table of 'cash surrender values,' which was refused by said defendant. (6) That at the time of said application, and at the date of issue of said policy, said Sheppe was, and he is now, a member of said Methodist Episcopal Church South, of North Carolina, in good and regular standing. (7) That said plaintiff is supported and maintained by voluntary contributions, gifts, bequests, and devises from members of said church, and by yearly assessments levied by the conferences of said church upon the various churches composing such conferences, which are paid by the members of said churches; and that but for such contributions, gifts, bequests, devises and assessments said plaintiff would fail of that support which is necessary to its useful existence."

The defendant demurred to the complaint on the following grounds: "(1) For that it appears in said complaint that the plaintiff corporation, Trinity College, has no insurable interest in the life of the assured E. S. Sheppe, and that the said corporation has paid to the defendant all the premiums that have been paid on said policy of in-

surance. (2) For that it appears in said complaint that the contract of insurance sued upon was but a wagering contract, entered into by the said plaintiff and defendant; the said plaintiff having at the time the said contract was entered into, and still having, no interest in the continuance of the life of the assured E. S. Sheppe, and said contract, being such a wagering contract, is against public policy, and cannot be enforced. (3) For that while it appears in said complaint that the assured, E. S. Sheppe, filed application for the policy of insurance, it appears that the plaintiff paid the premiums, and was the real party in making said wagering contract, and therefore cannot be permitted to recover on it. (4) For that it appears in the complaint that the contract of insurance provided for the payment of the cash surrender value upon the legal surrender of the policy, and it appears that the attempted and alleged surrender was made by the plaintiff only, and during the lifetime of the assured, which attempted and alleged surrender was not legal, the assured not joining in it."

Burwell, J. It is said in Mr. May's work on Insurance (section 102a) that "to have an insurable interest in the life of another one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life," and that an insurable interest in the life of another is "such an interest, arising from the relation of the party obtaining the insurance, either as creditor of or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." Accepting these definitions as those which are to be deduced from all the adjudged cases, and leaving out of consideration those cases in which the fact that there was an insurable interest was dependent upon the existence of ties of blood or marriage, we find that this author asserts substantially that, in cases where there exists no ties of blood or marriage, one can have an insurable interest in the life of another only when he is the creditor of or the surety for the assured. Under certain conditions a partner has an insurable interest in

the life of his copartner. Insurance Co. v. Luchs, 108 U. S. 498, 2 Sup. Ct. Rep. 949. So, one who is interested pecuniarily in the future earnings of another under a contract with him has an insurable interest in his life. Bevin v. Insurance Co., 23 Conn.. 244. These instances, and others that might be mentioned, seem to show that, except in cases where there are ties of blood or marriage, the expectation of advantage from the continuance of the life insured, in order to be reasonable, as the law counts reasonableness, must be founded in the existence of some contracts between the person whose life is insured and the beneficiary, the fulfillment of which the death will prevent; it must appear that by the death there may come damage which can be estimated under some rule of law, for which loss or damage the insurance company has undertaken to indemnify the beneficiary under its policy. When this contractual relation does not exist, and there are no ties of blood or marriage, an insurance policy becomes what the law denominates a "wagering contract," and under its rules, made and enforced in the interest of the best public policy, all such contracts must be declared illegal and void, no matter what good object the parties may really have in view. The end will not, in the eye of the law, justify the means. No error. Affirmed.

Note. Where the policy is taken out and premiums are paid by the beneficiary who has no insurable interest it is a wager contract and will not be enforced by the courts. Gordon v. Ware Nat. Bank, 132 Fed. 444, 67 L. R. A. 550, 55 C. C. A. 580; Cisna v. Sheibley, 88 Ill. App. 385; American Mut. Life Ins. Co. v. Bertram, 163 Ind., 51, 70 N. E. 258; Prudential Ins. Co. of America v. Hunn, 21 Ind. App. 525, 51 N. E. 772; Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 3 L. R. A. 934. Held that where one who had no insurable interest took out a policy and paid the premiums, the beneficiary named in the policy being the daughter of the insured, and where the one taking out the policy was to receive no benefit therefrom, was not a wager policy. McCann v. Metropolitan Life Ins. Co., 177 Mass. 280, 58 N. E. 1026.

ROMBACH v. PIEDMONT AND ARLINGTON LIFE INS. CO.

Supreme Court of Louisiana, 1883. 35 La. Ann. 233.

Insurable Interest.

Manning, J. The plaintiff insured the life of his mother-in-law in the defendant company in February, 1873, for $2,000, the policy reciting that it is issued "for the sole use of her son-in-law, L. Rombach." His wife, the daughter of Eliza Geisler, had died leaving two children of tender years. Mrs. Geisler had insured her own life a month before in this company for the benefit of two of her own children, for the same sum as this policy.

The agent of the company sought Rombach, and told him of the policy Mrs. Geisler had taken, and asked if he did not want to take another, to which Rombach answered approvingly, provided the consent of Mrs. Geisler was not necessary. He avowed his object to be the benefit of his only child, one of them having died. The agent assured him it was of no consequence whether she consented or not, provided he paid the premiums promptly.

The first quarterly premium of $22.86 was paid on the spot. Mrs. Geisler soon heard of the matter, and on March 2d, she wrote to the company expressing strong disapproval, and exhibiting bad feeling to her son-in-law, and demanding the cancellation of the policy. On the next day the agent, by direction of the company, offered to pay back the premium to Rombach and demanded the return of the policy for cancellation. Rombach refused to receive the money, and denied the company's right to cancel the policy, whereupon the company cancelled it, and notified both Rombach and Mrs. Geisler thereof.

Thereafter, Rombach on each quarter-day tendered the premium then payable on this policy to the company, until Mrs. Geisler's death in December, 1877, and the company refused to receive it.

The defendant pleads in answer that the policy is void

because obtained through false and fraudulent representations of Rombach, viz.: that he applied personally to the company for the policy, requesting its issuance, and represented that his mother-in-law desired the policy to be taken by him. We do not believe that. Rombach's plain, unvarnished statement is given already, and it is so perfectly in accord with the habit of insurance agents that it carries home conviction of its accuracy.

The additional defence is that the policy is "void for want of interest and consideration—that there was no love and affection between the assured and the beneficiary," and that he had not "such interest as the law requires to maintain such a policy."

The phraseology of this first quotation from the answer, as well as the interrogatories to all the witnesses, implies that the personal relations of the parties—their affection or hatred—is conceived to be the test of insurable interest. They do not affect it at all. Much time was wasted on both sides in exhibiting Mrs. Geisler's antipathy to her son-in-law at one time, and her reconciliation to him at another.

The insurable interest in the life of another is a pecuniary interest. A policy of insurance, procured by one for his own benefit upon the life of another, the beneficiary being without interest in the continuance of the life insured, is against public policy and therefore void. It is thoroughly settled, because universally held, that a wife has an insurable interest in the life of her husband, and although in that case especially it might be assumed that love and affection furnished a sufficient basis for it, the decisions do not place it on that ground, but rather on the support she is entitled to from him. The books formulate the general principle somewhat in this way: when the insurable interest arises, or is implied from relationship, it will be deemed to exist when the relationship is such that the insurer has a legal claim upon the insured for services or support. Even though such legal claim does not exist, yet where, from the personal relations of the two, and the kindness and good feeling displayed by

the insured to the insurer, the latter has a reasonable right to expect some pecuniary advantage from the continuance of the life of the former or to fear loss from his death, an insurable interest will be held to exist. Bliss' Life Ins., No. 31; May's Life Ins., Nos. 74, 106.

It was said in Phœnix Mut. Life Ins. Co. v. Bailey, 13 Wall. 616, "it is sufficient to show that the policy is not invalid, as a wager policy, if it appears that the relation of consanguinity or affinity was such as warrants the conclusion that the beneficiary had an interest, whether pecuniary, or arising from dependence, or natural affection, in the life of the person assured," but this is a dictum of Clifford, J., and is not in accord with the decisions generally. A majority of the reported cases will be found to be rested upon pecuniary considerations or expectations.

Thus it has been held that a sister had an insurable interest in the life of her brother, where the fact was that she had been supported by him, Lord v. Dall, 12 Mass. 115, and a father in the life of his minor son, because entitled to his earnings, Mitchell v. Un. Life Co., 45 Maine, 104; but that he has none from mere relationship to a son, Halford v. Kymer, 10 Barn. & Cres. 724; nor does the mere relation of brother suffice to furnish an insurable interest, Lewis v. Phenix Co., 39 Conn. 100.

It must be admitted that the courts are not in accord upon the kind or quality of the insurable interest. Sometimes statutory law has intervened and prescribed in general terms what is insurable interest. We have no statute on the subject, and therefore are not hampered by special restrictions, but are at liberty to apply the general principles that underlie the whole system of insurance law.

Rombach was in none of the categories of permissible insurers. He had no insurable interest in the life of his mother-in-law. This is conceded by his counsel, but inasmuch as he is natural tutor to his child, who is the grandchild of Mrs. Geisler, it is claimed that "the relationship of plaintiff by affinity to the deceased, and by blood to his own child, and the latter's relationship by blood, as

a forced heir, to both his father and grandmother, does constitute a substantial insurable interest."

This lengthened tie long drawn out is too attenuated to support a policy of insurance.

Besides, the policy on its face expresses that it is for his sole use. If he had died, and the policy was collectible, it would have insured to the benefit of his succession—to his creditors exclusively, if he had died insolvent.

Judgment affirmed.

WARNOCK v. DAVIS.

Supreme Court of the United States. 104 U. S. 775.

"It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of his parent, a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to protect the life of the insured than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such

policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

BANCROFT v. RUSSELL.

Supreme Judicial Court of Massachusetts. 1892. 157 Mass. 47.

Trustee Beneficiary.

Bill by Solon Bancroft against Arthur H. Russell to determine what disposition should be made of certain funds which plaintiff holds as the proceeds of life insurance policies on the life of William Proctor, payable to plaintiff as "trustee for Harriet Prescott," who died before said Proctor.

Field, C. J. St. 1887, c. 214, § 73, and Pub. St. c. 119, § 167, do not control this case. Although undoubtedly in the event which has happened Mr. Bancroft is the person to whom the money was payable, yet by the terms of the policy it was payable to him as "trustee for Harriet Prescott," and the question is, what is the nature of the trust? It is settled that a trust in personal property can be shown by oral testimony, and the word "trustee" does not conclusively define the nature of the trust. Chase v. Perley, 148 Mass. 289, 19 N. E. Rep. 398; Chace v. Chapin, 130 Mass. 128; Davis v. Coburn, 128 Mass. 377. On the face of the policies, the money was not to be paid, in any event, by the insurance company to Harriet Prescott. It was to be paid to the assured, William Proctor, on June 17, 1904, if he lived till that time; but, if he died before that time, then to "Solon Bancroft, trustee for Harriet Prescott." William Proctor survived Harriet Prescott, who was his mother, and died on October 23, 1889. There is no written declaration of the nature of the trust, and it does not appear that William Proctor made any statement

of the nature of the trust to Harriet Prescott, or even that she knew of the existence of the policies. It is agreed, if it is competent, that the plaintiff would testify "that said Proctor in his lifetime made oral statements that his design in creating said trust was that, from the proceeds of said policies, the care and support of his mother should be continued after his decease, which evidence shall be taken as true;" and that for many years before and up to the time of her decease he had been accustomed to furnish a large part of "all that was needed for her comfort." We are not required to consider whether, if the trust when created had been declared to be of certain nature, and this had been communicated to and accepted by the cestui que trust, and no power to revoke or modify the trust had been reserved, it could be modified or revoked by subsequent declarations of the donor. We assume that it could not. We infer that the statements referred to in the agreed statement of facts were statements to the trustee, and constituted substantially the only statements by the donor of his intention in creating the trust. We think they are competent, and, in connection with the other facts agreed, show that the trust was that if William Proctor died before June 17, 1904, the proceeds of the policies should be used by the trustee for the care and support of Harriet Prescott. Whether, if she had survived him, she would have been entitled to the whole proceeds, or only to such part as might be necessary for her support, we need not consider. Parkman v. Bank, 151 Mass. 218, 24 N. E. Rep. 43; Scott v. Bank, 140 Mass. 157, 2 N. E. Rep. 925; Chace v. Chapin, 130 Mass. 128; Clark v. Clark, 108 Mass. 522; Fuller v. Linzee, 135 Mass. 468. We are of opinion that, as she died before William Proctor, there is a resulting trust in favor of him, and that the proceeds of the policies are a part of his estate. Decree accordingly.

Note. Where the policy was made in accord with its stipulations for the sole use of the wife of the insured and she died before her husband and he made no further directions, *held* that the executor of the wife's estate was entitled to the proceeds

of the certificate. Brown v. Murray, 54 N. J. Eq. 594, 35 A. 748. Where the policy is payable to two or more beneficiaries, or to wife and children, or to husband and children, and one of the designated beneficiaries die before the insured, the survivors take the entire proceeds of the policy. Robinson v. Duvall, 79 Ky. 83; Bell v. Kinneer, 101 Ky. 271, 40 S. W. 686; Bickel v. Bickel, 25 Ky. Law Rep. 1945, 79 S. W. 215.

AMICABLE SOCIETY, Appellants, v. BOLLAND and Others, Respondents.

House of Lords, 1830. 4 Bligh, N. S. 194.

Assignment of Policy.

In Hilary Term, 1825, the respondents filed a bill in the Court of Chancery against J. C. Disney and wife, Sir E. Home, J. Birch, and the appellants, stating, among other things, that in 1815 Henry Fauntleroy effected insurance upon his life with the appellants in a policy payable to his executors, administrators, or assigns, that Fauntleroy paid the premiums from 1815 until his death, that in 1819 Fauntleroy made a gratuitous assignment of the policy to Sir E. Home and J. Birch, in trust for the wife of J. C. Disney, that in 1824 a commission of bankrupt issued against Fauntleroy, under which his estate and effects became vested in the respondents as his assignees under such commission, and that later in 1824 Fauntleroy died.

It was prayed, among other things, that the assignment to Sir E. Home and J. Birch be set aside, that the respondents be declared entitled to the policy and the proceeds, that the appellants be decreed to pay what was so due to the respondents, and that J. C. Disney and wife, Sir E. Home, and J. Birch be decreed, if necessary to assign the policy to the respondents.

The appellants' answer was to the effect that Fauntleroy was executed for a felony.

The respondents having settled with the claimants under

the assignment of 1819 and having obtained a reassignment, the cause came on to be heard before the Master of the Rolls, Sir John Leach, and it was decreed that the appellants should pay to the respondents the proceeds of the policy. The appeal was against this decree.

The Lord Chancellor. The circumstances of the case are shortly these: In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Company. In the month of May in the same year he committed a forgery on the Bank of England. He continued to pay the premiums upon this insurance for a considerable period of time. In the year 1824 he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondents. On the following day, the 30th of October, he was tried for this forgery; he was found guilty, sentenced to death, and in the month of November following was executed.

The question under these circumstances is this; whether the assignees can recover against the insurance company the amount of this insurance; that is to say, whether a party, effecting with an insurance company an insurance upon his life, and afterwards committing a capital felony, being tried, convicted, and finally executed—whether, under such circumstances, the parties representing him, and claiming under him, can recover the sum insured in the policy so effected. I attended to the argument at the bar, in conjunction with the noble lord now present, and we have both come to the conclusion that the assignees cannot maintain this suit.

It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year, upon condition that in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of

public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes, namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of public policy, be sustained, how is it to be contended that, in a policy expressed in such terms as the present, and after the events which have happened—that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which if expressed in terms would have rendered the policy, as far as that condition went, at least, altogether void?

Upon this short and plain ground, therefore, independently of the more complicated arguments referred to by the counsel at the bar, in the discussion of this case, I think that this policy cannot be sustained, and that the respondents are not entitled to recover. I submit, therefore, that the judgment of the court below ought, under these circumstances, to be reversed. Judgment reversed.

COOPER v. WEAVER'S ADM'R.

Supreme Court of Pennsylvania. October 3, 1887. 11 Atl. 780.

Assignment of Policy to Creditor.

Error to court of common pleas, Lebanon county.

Action by plaintiff, Weaver's administrator, against defendants, Bloach and Cooper, to recover money paid them as assignees of an insurance policy on Weaver's life. Judgment for plaintiff, and defendant Cooper brings error.

Sterrett, J. It is conceded that the policy of $3,000 on the life of Weaver was taken out, and immediately assigned to Bloach, for the purpose of securing a debt of $100 due by the former to the latter. Subsequently, one-half interest in the policy was assigned by Bloach to plain-

tiff in error, but Weaver was not in any manner a party to that transaction. On the death of Weaver, the insurance company, recognizing its liability for the amount insured, paid $1,800 thereof to Cooper, and the residue to Bloach. In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance, $3,000, and the debt, $100, was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money recovered by them than the amount of the debt, plus the premiums paid, and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law.

It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother Paxson, in Grant's Adm'rs v. Kline, 19 Wkly. Notes Cas. 260, 9 Atl. Rep. 150, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of the premiums, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule. It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but as is said in Corson's Appeal, 113 Pa. St. 438, 445, 6 Atl. Rep. 213: "In all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary, or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They

are therefore, independently of any statute on the subject, condemned as against public policy." But in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction.

There is no merit in either of the specifications of error. Judgment affirmed.

MORRIS v. GEORGIA LOAN, SAVINGS & BANKING CO. et al.

Supreme Court of Georgia. Oct. 25, 1899. 109 Ga. 12

Assignment. Rights of Assignee.

Little, J. Morris, as administrator of Ragland, instituted an action against Cassin, Purtell, and the Georgia Loan, Savings & Banking Company, a corporation doing business in the city of Atlanta, to recover the sum of $4,556.31, with interest, which he claims the defendants to be due to him under the following alleged facts: In May, 1895, Ragland procured from the Connecticut Mutual Life Insurance Company a policy of insurance upon his own life for the sum of $5,000, on which the annual premium was $103.15. The premiums were payable quarterly, and Ragland paid such premiums as were due on May 27 and August 27, 1895. Being unable to continue the payment of the premiums, Cassin and Purtell agreed to advance to him the amounts necessary to pay the same as they became due, and, to secure payment of the amount so advanced, Ragland assigned the policy to Cassin and Purtell, who required and received of Ragland his promissory note, dated December 11, 1895, for $4,300 principal, to become due one year after date. This pretended debt was fictitious, except as to the premiums advanced by Cassin and Purtell. At the time of these transactions, Cassin was the cashier of the defendant banking company. After the execution of the note, Cassin and Purtell indorsed it in blank, and made a pretended transfer of it to the defendant

the banking company, which took the same with notice of its character. On November 5, 1896, Cassin and Purtell also transferred the policy of insurance to the banking company. A short time thereafter Ragland died. Cassin, as cashier of the banking company, made out and forwarded proofs of death, and on the 31st day of December, 1896, the insurance company paid to the banking company the face value of the policy ($5,000), which was consented to by the plaintiff in error under notice that he, as administrator, would claim from the banking company the amount so paid, less what had been advanced to Ragland by Cassin and Purtell. Of the $5,000 the banking company retained $4,663.11, and $309.89 was received by Ragland's administrator. By the terms of the policy, the amount insured was payable to the representatives of Ragland, and the only claim that Cassin and Purtell and the banking company have on the fund is the amount of one premium, $106. No services were rendered, accepted, or contracted for from Cassin, Purtell, or the banking company. Defendants answered, admitting certain allegations, and denying others, which raised an issue as to the good faith of the defendants in taking the note and assignment of the policy. It was also admitted that Cassin was cashier of the defendant banking company. On the trial, the policy of insurance was introduced in evidence, being for the sum of $5,000, dated May 27, 1895, providing for an annual premium of $103.16, insuring the life of Hudson E. Ragland, and payable to his executors, administrators, or assigns, and containing other stipulations not necessary to be enumerated. To this policy was attached certain assignments,—one from H. E. Ragland to H. A. Cassin and J. H. Purtell, dated December 11, 1895, consideration $5; the second, by Cassin and Purtell to the banking company, reciting a consideration of $4,609.60. Certain letters were also introduced, written by the insurance company to Cassin in 1896, acknowledging the receipt from the latter of two payments of $26.55 for premiums on the policy of insurance and of copy of assignment of the policy, and, later, of the receipt of the policy with release duly executed.

The oral testimony was, briefly stated, as follows: Mr.

Felder, one of the counsel for the plaintiff in error, testified that he knew Ragland, who was stenographer for the witness' firm. Ragland died about December, 1896. He received from $25 to $30 per month for his services as a stenographer. He was very poor, and witness never saw any signs of his having any large amount of money at any time. He had no visible property up to the date of his death. There was no evidence of his having any more money than what he received from his salary. Witness' firm had an office in the building known as "Temple Court." The defendant banking company, Cassin, and Purtell were just across the street. Purtell had an office which was either connected with some company that Cassin was following or in the back room of the bank building. Cassin had an office designated by the sign "Cashier," the bank business being immediately in the rear of it. "I went over to see Cassin to talk with him about this matter of insurance. I knew him very well. Purtell was present on one occasion. We had prepared the petition in this suit. I said to Cassin that I supposed he did not desire the petition filed; that, as a matter of course, he did not let Ragland have the money, and I did not think he could insist on keeping it. I told him he was not entitled to anything more out of the policy than he put into it. He said he thought he was; that he was entitled to it without reference to the amount of money he put in the policy; and said he was going to contend for it, or words to that effect. I said, 'Cassin, you didn't put into this policy any more money than the premiums advanced.' He said either he or Purtell or both had given Ragland something additional—$25 or $30—above the premium. I told him that if he could stand the suit we could, and that I would file the petition. He then asked me to wait until the next day, so that he could see a lawyer, and get advice as to whether or not they could hold the money. I did not call again but was sent for, and Cassin said that he had discussed the matter with Purtell, and they had been advised that they had a right, without reference to the amount of money advanced to Ragland, to keep the whole proceeds of the policy. He did not mention paying anything except the premium and a small amount of $25 or $30. I told him that

any claim that he let Ragland have any money was absurd, and he admitted it. The conversation occurred in the office of the Georgia Loan, Savings & Banking Company. No one else was present, and no one higher in authority than Cassin. Cassin represented the bank,—was acting as cashier." Witness further stated that the occasion of his visit was to see both Cassin and the bank. His understanding was that Cassin was the bank. Had been there several times, and had never seen any one else doing anything. "Cassin or Purtell told me they had transferred the policy to the bank for a valuable consideration." The conversation was after the death of Ragland and the money had been collected. Ragland was not a robust, vigorous man. He was a very small, delicate young man. Herrington testified that he was security on the bond of Morris as administrator. He went to the bank at different times with, and also without, Morris. Whenever he went there, Cassin represented the bank. No one else acted on behalf of the bank in paying the money, or claimed to be interested for the bank, except Cassin. No one seemed to be over him or have charge of him on the subject. "When I went there Cassin said he would pay the difference between the note and the policy and that was all he would do. I inquired of him about the note, and how he came to obtain it, and he gave me to understand that I need not pry into his business. I asked him how the boy [Ragland] came to give him the note. He said, 'The note will speak for itself.' That was in the place of business of the bank." Moyers testified: "Knew Cassin, and had some knowledge of the Georgia Loan, Savings & Banking Company, and some dealings with it. Since I have known the company, Cassin was in charge of it, so far as I could see and know. Have known it for eight or nine years. They were originally in an upstairs room at the corner of Alabama and Whitehall. Cassin was in charge. They then removed to the corner of Lloyd and Alabama. Cassin still had charge, so far as I know. From there they moved to 24 South Pryor. My office was in the adjoining building. I saw that place of business repeatedly during the day, and, so far as I could know, see, and judge, Cassin was in charge of it then. I did not

know of any one else having active control of affairs. Had many business dealings with the bank. Cassin acted in its behalf, and I recall no transaction I ever had with it that he did not immediately act. Knew some of the directors. Knew Grant, who was president, when he first got acquainted with the institution. Also knew Gress by sight." Witness does not mean to say that Cassin was the owner of the bank, but the "big boss," so far as his conduct was concerned. Smith testified: Was related to Ragland by marriage. He died about September, 1896. Had no property, and no means and no income, except his salary as stenographer, that witness knew. Gress testified: That he was president of the Georgia Loan, Savings & Banking Company in 1895 and 1896. Cassin was the cashier. Witness took no part with Cassin and Purtell in getting the note and insurance policy from Ragland. Had nothing to do with discounting the note. Was out of the city. Knew the paper was in there, but did not know whose it was. He found it afterwards in the assets of the bank, before it was due. "We had papers on a large number of borrowers." Did not know anything about the people.

This evidence being submitted, defendants moved for a nonsuit. The plaintiff then offered to amend his petition by averring that the note of $4,300 was given by Ragland for an advance of $106, and that $4,194 of the sum was usury, and that the bank is affected with notice thereof. The amendment was objected to, disallowed by the court, and a judgment was then rendered granting a nonsuit in the case, to which the plaintiff excepted. An exception is also taken to the refusal of the court to require the defendant banking company to produce its books under a subpœna duces tecum.

1. It is insisted on the part of the plaintiff in error that there was evidence before the court which would have authorized the jury to have found that, having made a valid contract of insurance on his life, payable to his executors, administrators, and assigns, Ragland was induced by the two defendants, Cassin and Purtell, to transfer and assign the policy to them for a consideration of $25 or $30 in addition to the payment of certain subsequent premiums as they fell due, and

that the note of $4,300 delivered by Ragland to the assignees was really without any consideration, and made as a cover to conceal the nakedness of the transfer. An examination of the evidence contained in the record shows that the policy was issued to Ragland on May 27, 1895, and that the assignment of the policy to Cassin and Purtell was made on December 11, 1895, more than six months thereafter. It does not appear that Cassin paid any premiums until May subsequent to the assignment, and, for aught that appears in the record, the policy evidences a good and valid contract insuring the life of Ragland. If it be true that there was no consideration for the note of $4,300, and that the same was executed and delivered by Ragland only for the purpose of enabling the assignees to claim the entire amount of the policy, it must fail to accomplish that result; for, as a matter of law, an assignment of a policy of life insurance to a creditor by the insured, and for the purpose of securing his indebtedness, is valid only in the amount of the debt and the expense incurred by the creditor in keeping up the policy. In 2 May, Ins. §459a, it is said: "A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor and his representatives, or remain with the company, according as the insurance is upon life or on property." And in 13 Am. & Eng. Enc. Law (1st Ed.) p. 648, it is declared, on the authority of adjudicated cases cited, that, "where the assignment is for the purpose of securing a creditor, although he is entitled to recover the face of the policy, he cannot hold what is not necessary for his indemnity. The legal representatives of the debtor will be entitled to the balance." A case which seems directly in point is that of Cammack v. Lewis, 15 Wall. 643, where it appeared that L. was indebted to C. in the sum of $70, and, at C's suggestion, L. took out a policy on his life for $3,000, for which C. paid the premium. Immediately after the policy was issued L. gave to C. a note for $3,000, and assigned to him the policy of insurance. A short time thereafter L. died, and the widow filed a bill to recover the amount of the policy, or, rather, such a part of it as she had not theretofore received. In de-

livering the opinion of the court, Mr. Justice Miller said: "We think that Cammack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned and such advances as he might afterwards make on account of it, and that the assignment of the policy to him was only valid to that extent." See, also, the case of Bank v. Loh, 104 Ga. 446, 31 S. E. 459, where this court held that a creditor has, for the purpose of indemnifying himself against loss and for no other, an insurable interest in the life of his debtor, and that the insurance will be available to the creditor to no greater extent than the amount of his insurable interest at the time the insurance was effected, viz. the amount of the then existing indebtedness. So that if it be true that, at the time he executed and delivered the promissory note for $4,300 and assigned the policy of insurance to Cassin and Purtell, Ragland was in fact a debtor to the assignees in an amount less than the face of the policy, the effect of the assignment was to vest in the assignees title to so much of the fund collected as equalled the amount of the true indebtedness. The original contract of insurance made the executors and administrators of Ragland, as well as his assigns, the payees of the policy, and after payment of the debt his assignment secured the administrator would in law be entitled to have the balance. But it is urged that, even if the note was without consideration, the inference is legally irresistible that the purpose of the parties in the execution of the note and the assignment of the policy of insurance was an accommodation. How this is we, of course, do not know. Only a jury, under proper instructions, should determine that fact.

2. It is further insisted by counsel for defendant in error that the evidence showed that the banking company was a bona fide holder of the note and transferee of the policy of insurance for value, before due, and that fact precludes a recovery by the administrator. A bona fide holder of a negotiable promissory note, receiving the same before due, for value, is protected against a plea of failure of consideration. But the subject-matter of the present action is to recover from the defendants a sum of money which it is alleged they collected, and which belongs to the plaintiff. The collection of the

money, and its retention by the defendants, cannot be based on the fact that they are innocent holders of a promissory note of the insured, received before due, for value. The money for which suit was brought did not come into the hands of the defendants as the proceeds of any negotiable instrument, and their right to collect the policy, and to hold the amount as payment of the note, depends upon the assignment of the policy and not upon the manner in which they hold the note. A policy of insurance is a contract which is not negotiable, but is assignable, and the law which protects the bona fide holder of a negotiable promissory note, when received before due and for value, in no sense applies to the transfer or assignment of a contract of insurance. Unless the assignor has a right or interest in the contract which he is capable of assigning, the assignee takes nothing by the assignment, and that he has such right and interest the assignee must determine at his peril. "A policy of insurance is assignable as well absolutely as by way of mortgage or pledge to secure a debt." It is a "chose in action, governed by the same principles applicable to other agreements involving pecuniary obligations." Bliss, Ins. § 328. Being a chose in action, a contract of this character may be assigned so as to vest the title in the assignee, but the latter takes it subject to the equities existing between the assignor and debtor at the time of the assignment. Civ. Code, § 3077. However, we are not disposed to omit from our consideration the important legal question on which the parties are at issue, and which must ultimately control the disposition of the fund arising from the collection of the policy of insurance. It is contended by counsel for the plaintiff in error that if the note given by Ragland was without consideration, and received by the payees as a cover under which they might hold the policy by transfer, the knowledge of Cassin, one of the payees of the character of the note, must be imputed to the bank of which he was cashier. This contention is denied by counsel for the defendants in error, who insists that, even if the theory of the plaintiff in error be correct as to the origin of this note, and the scheme which Cassin is charged with having engineered, be true, then the bank is not chargeable with any notice or knowledge of Cassin; that, if

it discounted the note before due and for a valuable consideration, the law will not impute to it the knowledge of Cassin. Assuming, for the sake of the argument, that the note at its execution was without consideration, invalid, and part of a scheme to defraud, it becomes important to ascertain what business relation Cassin, one of the payees, bore to the banking company, and in what manner the note was negotiated. One of the witnesses testified that he had known the banking company for eight or nine years; that Cassin was apparently in charge of affairs; that witness knew of no one else having active control of affairs besides Cassin; that witness had a great many business dealings with the bank; that Cassin acted for the bank whenever such dealings were had, and he does not recall any transaction ever had with the bank where Cassin did not act. The president of the bank testified that he knew nothing about any of the notes, or any of the parties to any of the bank notes, and had nothing to do with the discounting of them; that he was out of the city when Ragland's note was discounted; that he afterwards found it in the assets of the bank. For aught that appears in the record, no other officer of the bank ever knew of, or had anything to do with, the note of Ragland and the policy of insurance until after the former was discounted and the latter transferred. Therefore what was done for the bank was done by Cassin without consultation. And just here we may call attention to the fact of the difference which existed in the manner of conducting the business of this banking company and that of ordinary banks of discount. Usually, in the latter, the question of discounting paper comes before the board of directors or a committee, and the cashier is but the executive officer to carry out their decision. His duties are ordinarily strictly executive. It is, however, nevertheless true that, beyond his inherent powers, the cashier may be authorized to act for the bank by the organic law, by action of the stockholders, by a vote of the board, by usage, and tacit approval (1 Morse, Banks, § 165); and, if it be assumed in this case that the duties inherent in the office of cashier do not fix the status of Cassin as such officer of the bank for the discounting of commercial paper as would make the bank chargeable with a notice to him, the evidence fully

warrants the conclusion that he in fact, by permission of those interested in the bank, did exercise those duties, and that no one else did. Our Civil Code (section 3027) declares that notice to the agent of any matter connected with his agency is notice to the principal; and under this established rule of law, it is insisted that, when Cassin represented the bank and discounted the note of Ragland payable to himself and Purtell, he did it as the agent of the bank, and with full knowledge at that time that it was entirely without consideration; and that, therefore, the bank is not a bona fide holder without notice. While conceding the general rule, counsel for the defendants in error insists that it is qualified by a well-recognized exception, and that the true rule is clearly set out in the opinion in the case of Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 330, as follows: "So long as the agent acts within the scope of his employment in good faith, for the interest of his principal, he is presumed to have disclosed to his principal all the facts that come to his knowledge; but just as soon as the agent forms the purpose of dealing with his principal's property for his own benefit and advantage, or for the benefit or advantage of other persons who are opposed in interest, he ceases in fact to be an agent acting in good faith for the interest of his principal, and such purpose is deemed to be a fraud on the rights of his principal, and the presumption that he discloses all facts that have come to his knowledge no longer prevails."

We are not prepared to admit that where the agent has notice the doctrine of implied notice to the principal rests alone on the presumption that the agent will disclose his knowledge to his principal. Many adjudicated cases place it there, others do not, and we shall take occasion presently to cite some of the latter, and present some of the reasons why the Arnoux Case, supra, falls short in setting the rule applicable to the case at bar. We may say here that we find it impracticable to review in detail the many interesting and pertinent cases cited by counsel for defendant in error. Necessarily, in stating the reasons which impel our conclusions, we, to some extent at least, discuss the principles which they enunciate. Taking the rule of constructive notice as stated in our Code to be

fully established, and considering, in connection therewith, the exception to this general rule urged by counsel, we call attention to the view of Judge Story as expressed in his work on Agency (section 140). He says: "Notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from, or is at the time connected with, the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and, if he has not, still the principal, having intrusted the agent with the particular business, the other party has a right to deem his acts and knowledge obligatory upon the principal. Otherwise, the neglect of the agent, whether designed or undesigned, might operate most injuriously to the rights and interests of such party." In discussing the duty of the agent to communicate the knowledge which he has to the principal, Mr. Wade, in his treatise on the Law of Notice (section 690) says: "The restriction of the rule to cases where there is a probability that the agent will communicate the knowledge seems to have had its origin in a total misapprehension of the purposes for which the rule was established. It tends to defeat the application of the doctrine to cases where it is most essential in the promotion of good faith and fair dealing;" and cites the following cases as an example: A solicitor acted for both parties in preparing a deed which contained a covenant against prior incumbrances. The same solicitor had previously prepared a mortgage on the identical property. The court held that the fact that the solicitor was employed by the party whose interest it was to conceal the prior mortgage was sufficient evidence that it was concealed from the principal, and he was therefore unaffected by the knowledge of his agent. Further referring to this case, the author says: "Leaving out of consideration the probable event of its being utterly impossible for the agent to communicate the knowledge in time, the case cited above fairly illustrates the danger of resting the rule upon the presumption that the agent communicates the knowledge of which he is possessed, unless such presumption is conclusive. The doctrine announced in this case is against the weight of authority, both in England and in this country." Again, this author, in sec-

tion 683b, declares, upon authority, that "a corporation will always be affected when the notice comes to it through an officer within whose special line of duty the matter in question lies"; and that "the cashier of a bank is the particular officer who has charge of the ordinary business of the bank, and for this reason notice of facts affecting its business will bind the corporation." In treating of the effect of notice to directors and other officers of a corporation, the same author, in section 683a, declares: "And where he [the officer] acts for the corporation in the transaction of the business in respect to which it is sought to charge it with notice, as where he, as one of the board of directors, authorizes the discount of a note procured by fraud, of which he had notice, the bank would be bound as though his knowledge had been communicated to the entire board. When the fact in question comes to the knowledge of a director or other officer when he is making authorized official inquiry, or is otherwise engaged officially for his principal, it can be of no consequence that he fails to communicate it;" citing Bank v. Cushman, 121 Mass. 490; Bank v. Davis, 2 Hill, 454; Bank v. Payne, 25 Conn. 444; Railroad Co. v. Schuyler, 34 N. Y. 30; Marshall v. Insurance Co., 27 N. H. 157. Mr. Pomeroy, in the second volume of his Equity Jurisprudence (section 666), after declaring that the rule which we are considering alike includes and applies to the positive information or knowledge obtained or possessed by the agent in the transaction, and to actual or constructive notice communicated to him therein, says: "The rationale of the rule has been differently stated by different judges. By some, it has been rested entirely upon the presumption of an actual communication btween the agent and his principal; by others, upon the legal conception that for many purposes the agent and principal are regarded as one."

We admit the existence of many adjudicated cases which seemingly support the contention of the defendants in error as to the exception to the general rule under which they claim that the banking company is entitled to hold the note of Ragland freed from any implied notice of Cassin's fraud, if such there be. But a distinction must be drawn in these cases between the exception and the rule. We concede it to be a sound

proposition that where an officer or agent of the corporation, as a party in interest, for himself deals with the corporation, the latter is not charged with notice of the information possessed by such officer or agent so dealing, but it is because in such a transaction the assumed agent is in reality the adverse party, and is not to be treated in so dealing as an agent of the corporation at all; and many, if not a majority, of the cases which announce the doctrine that, when the agent has an interest in the transaction which would be prejudiced by the disclosure of the information, the presumption of its communication does not prevail, will be found to be where the agent or officer acts in his individual capacity, and treats with some other officer or agent of the corporation. In these cases the two parties to the contract are the corporation and the individual who happens to be an officer of the corporation, but acting in the prosecution in his individual capacity. But the principle involved in those cases cannot be fully applicable to a case where one party, having knowledge of the invalidity of a paper of which he is the ostensible owner, discounts it in a bank of which he is the duly-authorized agent, and is himself the only actor for the bank, and by his act enables the bank to collect and retain the proceeds of such paper, against the rights of the true owner. In such a transaction, he is either the agent of the bank to discount the paper or he is not. If he is not, then the discounting was illegal, and the owner is entitled to it or its proceeds. If he is the agent of the bank, and the facts insisted on here existed, his action would be a fraud upon the rights of the owner, of which the bank cannot take advantage. In the case of First Nat. Bank of New Milford v. Town of New Milford, 36 Conn. 93, it appeared that Conklin was at the same time treasurer of the town and cashier of the bank; that he took $3,000 from the bank for his own use, and executed a note to it for the amount as treasurer of the town, he having been allowed and accustomed to make loans for the bank without consulting the directors. The money he received was put to his personal use. None of the officials of the town knew of the existence of the note until afterwards, when the defalcations of C. became public. At the date of the note the town was not in need of money. On

the question of the knowledge of the bank, the court in that case said: "If Conklin, as agent of the town, had applied to the directors for a loan, offering the note, and telling them that he had drawn it, not for the benefit of the town, but for his own benefit, without consulting the officers of the town, and when there was a sufficient supply of money in the treasury, it must be conceded that the board would in making the loan have been particeps criminis in the fraud, and the bank could not recover. * * * We cannot perceive that that case would differ from this. The contract, if any was made, was made by Conklin on behalf of the bank. No other mind but his met the mind of the agent of the town in making the contract. He, as agent of the bank, had full knowledge, therefore, of the fraud; and now the bank, if they ratify his contract and confirm his agency, must accept his knowledge and be bound by it, precisely as if the loan had been made and the knowledge had by the board of directors." The supreme court of New Hampshire has ruled that if one without authority assume to act as the agent of another, and the latter take the benefit of the unauthorized act by claiming rights under it, or otherwise ratifying the acts of his self-appointed agent, he must take such benefit with notice of such matters as appear to have been within the knowledge and recollection of the agent at the time of the transaction. Hovey v. Blanchard, 13 N. H. 145. And it seems to be established that, where one is an officer of two corporations which have business transactions with each other, his knowledge cannot be attributed to either corporation in a matter in which he did not represent it. If he did represent one or both, his action would be binding, and his knowledge would attach to the one represented. Smith v. Farrell, 66 Mo. App. 14. See, also, Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186; Farmers' & Traders' Bank v. Kimball Milling Co. (S. D.) 47 N. W. 402; Bank v. Davis, 2 Hill, 451; Holden v. Bank, 72 N. Y. 286; Webb v. Manufacturing Co., 11 S. C. 396. In a case reported in 134 Mass. (Loring v. Brodie, 134 Mass. 453), it appeared that B., as trustee, held certain trust funds; that, as an individual, he owned a bank. F. was the cashier of the bank, and was also agent of B. F., as agent, was in possession of certain moneys belonging to B.'s

trust fund, and wrongfully paid the same in discharge of a private indebtedness which B. owed the bank, either to himself as cashier or to the teller. On a bill filed by the cestui que trust, the court ruled that the bank must restore the money; that F.'s knowledge was the knowledge of the bank; that the bank could not receive the trust funds except charged with the knowledge that the cashier had, and subject to the responsibilities which that involved, and said: "If F. was the instrument of B. in committing a fraud on the bank by unlawfully transferring to it the securities of another, whether he concealed this fact or not, the bank could not take the securities from his hands or hold them in its custody, except with the knowledge he had. The only authority the bank could have to hold or sell them was under the contract made by or through Fuller, its cashier." In the case of Davis Co. v. Davis Co. (C. C.) 20 Fed. 699, where the transaction was had between one who was an officer with other agents of the corporation, two propositions are discussed and decided which refer to the distinction above suggested. The first is that "a corporation is charged with notice of facts known to a director who is an active agent of the corporation in the transaction affected by his knowledge, although he acquired his knowledge unofficially." The second is that "a corporation is not charged with notice of facts known to its officer or agent in a transaction between him and the corporation in which he is acting for himself, and not for the corporation." In the case of Brobston v. Penniman, 97 Ga. 527, 25 S. E. 350, it appeared that three persons formed a partnership. Two of the three were, respectfully, president and cashier of a bank. The two persons holding said offices, without the knowledge of the third, executed and delivered to the bank in which they were officers a promissory note, in the name of the partnership, to raise a sum of money which they had agreed to put in the partnership business. It was held that the knowledge of the president and cashier of the facts mentioned was the knowledge of the bank itself, and, in a suit on the note so given, it was held for that reason that the bank was not entitled to recover against the partnership. See, also, Holden v. Bank, 72 N. Y. 286, Institute v. Bostwick, 19 Hun, 354. It was held in the case of

In re Millward-Cliff Cracker Co. (Pa. Sup.) 28 Atl. 1072, that "the fraud of a bank president in contriving and negotiating in his bank fraudulent notes of a corporation, for his own use, imputes knowledge to the bank, and it has no claim against the corporation." It is our opinion that, under the evidence submitted, a jury would have been authorized to find that the insurance policy was a good and valid contract; that the execution of the promissory note and the transfer of the policy of insurance by Ragland to Cassin and Purtell were without consideration, and in fraud of the payees of the policy, the executors and administrators of Ragland; and that the defendant banking company took the note and the transfer of the policy of insurance with the knowledge of Cassin that the same was fraudulent and without consideration. We do not, of course, mean to be understood as intimating that these facts are conclusively established by the evidence, but only that a jury could, under the evidence, have found them to be true, and, if they had, the plaintiff in the action would have been entitled to recover. The court, having granted a nonsuit, thereby refusing to permit the jury to render a verdict under the evidence in the case, committed error, and the judgment is reversed. All the justices concurring.

GORDON v. WARE NAT. BANK OF WARE, MASS.

Circuit Court of Appeals, Eighth Circuit. August 22, 1904.
No. 1,995. 132 Fed. 444.

Insurable Interest, in Assignee.

In Error to the Circuit Court of the United States for the District of Kansas.

This action involves a controversy over the ownership of the proceeds of a policy of insurance between the administrator of the estate of Melissa A. Gordon, the plaintiff, and the Ware National Bank, the defendant. The insurance company admitted its liability, and paid into the court below the amount

owing upon the policy, which insured the life of William Gordon for $5,000. All the premiums required to be paid by this policy had been paid by Gordon before the year 1879. The amount promised by the policy was payable upon the death of William Gordon to his wife, Melissa A. Gordon, if living; otherwise to the children of William Gordon. Gordon died on March 6, 1902, leaving his wife and two children surviving. Melissa A. Gordon died on March 14, 1902, so that, if Melissa Gordon was not deprived of all interest in the policy by the facts which are about to be stated, her administrator, the plaintiff, is entitled to recover its proceeds. On June 11, 1879, William Gordon and Melissa A. Gordon, his wife, assigned the policy to the German Bank of Leavenworth, Kan., as collateral security for the payment of loans made by it to William Gordon. On May 8, 1882, the German Bank brought an action in the district court of Leavenworth county, in the state of Kansas, against William Gordon and Melissa A. Gordon to foreclose the pledge of the policy by a sale of it and the application of the proceeds to the payment of a debt of $8,217.01, which was then owing by William Gordon to the bank. The Gordons appeared in that action, admitted that the indebtedness of William Gordon to the bank was $8,217.01, and that they had pledged the policy to secure the payment of this debt, and they consented to an immediate trial of the action without making any farther defense. Thereupon the court tried the case, and rendered a decree that the bank should recover of William Gordon $8,217.01; that the policy of insurance should be advertised and sold; that the proceeds of the sale should be applied to the payment of the debt of William Gordon to the bank; and that the defendants William Gordon and Melissa A. Gordon were "forever barred of and from having or claiming any lien upon or interest in or to" the policy after its sale. Under an execution issued upon this judgment the policy was sold by the sheriff to the German Bank for $150, and it was subsequently assigned for value by the German bank, through several mesne conveyances, to the defendant, the Ware National Bank. Neither the Ware National Bank nor any of the assignees through whom the policy passed from the German Bank to it was a creditor of William Gordon, or had any in-

terest in his life. The Ware National Bank claimed the proceeds of the policy as the remote assignee of the German Bank. The plaintiff, the administrator of the estate of Melissa A. Gordon, demanded these proceeds upon the ground that the assignees of the German Bank had no insurable interest in the life of Gordon, and that for this reason the assignments to them were void, and the policy remained the property of Melissa A. Gordon when she died. The court below sustained the claim of the Ware National Bank, and rendered a judgment in its favor.

Before Sanborn and Van Devanter, Circuit Judges, and Amidon, District Judge.

Sanborn, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The issue of a policy of insurance to one who has no interest as a relative, dependent, creditor, or otherwise, in the life insured, and who pays the premiums for the chance of recovering upon the policy, is against the public policy of this nation, and void, because the interest of the holder of the policy is to shorten, rather than to lengthen, the life insured, and his maintenance of the policy is of the nature of a wager. Evasions of this rule by the issue of a policy to one who has an insurable interest, and its immediate assignment, pursuant to a preconceived intent, to one without such an interest, who undertakes to pay the premiums for his chance of profit upon his investment, are equally ineffective, and such assignments are void. Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 461, 24 L. Ed. 251; Cammack v. Lewis, 15 Wall. 643, 21 L. Ed. 244; Warnock v. Davis, 104 U. S. 775, 782, 26 L. Ed. 924. A creditor has an insurable interest in the life of his debtor, and a policy on the latter's life issued to him, or issued to one who has an insurable interest in the life of the debtor and subsequently assigned to him, is valid and enforceable in his hands. Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 461, 24 L. Ed. 251; Warnock v. Davis, 104 U. S. 775, 778, 26 L. Ed. 924.

Counsel for the plaintiff insist that the Supreme Court of the state of Kansas has determined that every assignment of an insurance policy is void unless the assignee has an insurable

interest in the life protected, and that this decision is controlling in the federal courts, because the assignments here in question were executed in the state of Kansas. But the question whether or not an insurable interest in an assignee of a policy issued to one who had such an interest is indispensable to the validity of the assignment of it is a question of general law which it would be a dereliction of duty for a federal court to decline to consider and determine for itself. The opinion of the court of the state in which the assignment is executed upon this question is not controlling in a national court. Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co., 70 Fed. 201, 203, 17 C. C. A. 62, 65, 30 L. R. A. 193; Speer v. Board, 88 Fed. 749, 762, 32 C. C. A. 101, 114; Clapp v. Otoe County, 104 Fed. 473, 477, 45 C. C. A. 579, 582.

There is some conflict of authority among the courts of the states upon the question whether or not the assignment of a policy for value in good faith by one who has an insurable interest to one who has not such an interest is valid. The Supreme Court of Indiana, in the case of Franklin Life Ins. Co. v. Hazzard, 41 Ind. 116, 13 Am. Rep. 313, declared that such an assignment was as obnoxious to the rule against wager policies as the issue of a policy to one without interest, and that it was void. The courts of the states of Alabama, Kansas, Kentucky, Missouri, North Carolina, Pennsylvania, Texas, and Virginia have followed this declaration. Alabama Gold Mutual Life Ins. Co. v. Mobile Mutual Life Ins. Co., 81 Ala. 329, 1 South, 561; Helmetag's Adm'r v. Miller, 76 Ala. 183, 52 Am. Rep. 316; Missouri Valley Life Ins. Co. v. Sturges, 18 Kan. 93, 26 Am. Rep. 761; Missouri Valley Life Ins. Co. v. McCrum, 36 Kan. 146, 59 Am. Rep. 537, 12 Pac. 517; Price v. First Nat. Bank, 62 Kan. 743, 64 Pac. 639; Schlamp v. Berner's Adm'r, 21 Ky. Law Rep. 324, 51 S. W. 312; Burnam v. White, 16 Ky. Law Rep. 241, 22 S. W. 555; Heusner v. Mutual Life Ins. Co., 47 Mo. App. 336; Powell v. Dewey, 123 N. C. 103, 68 Am. St. Rep. 818, 31 S. E. 381; Downey v. Hoffer, 110 Pa. 109, 20 Atl. 655; Gilbert v. Moose's Adm'r, 104 Pa. 74, 49 Am. Rep. 570; Cheeves v. Anders, 87 Tex. 287, 47 Am. St. Rep. 107, 28 S. W. 274; Schonfield v. Turner, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; Long v. Meriden

Brittania Co., 94 Va. 594, 27 S. E. 499. The reason for this view that the assignee who pays the premium practically wagers it upon the early close of the life insured has much less force where, as in the case at bar, the premiums have been paid before the assignment is made. Connecticut Mutual Life Ins. Co. v. Schaefer, 94 U. S. 457, 462, 24 L. Ed. 251; Bursinger v. Bank of Watertown, 67 Wis. 75, 83, 30 N. W. 290, 58 Am. Rep. 848. The rule adopted by these states greatly detracts from the value of life insurance policies, and restricts their commercial value; for, if their possible purchasers are limited to those who have insurable interests in the lives they insure, it is obvious that buyers will be few, and their commercial value and the traffic in them must be much less than if all men may become their lawful purchasers. In view of this fact the Supreme Court of the United States and the courts of the great commercial communities of this country—of New York, Ohio, Massachusetts, Illinois, Michigan, New Jersey, California, Minnesota, Connecticut, Louisiana, Rhode Island, Wisconsin, Nebraska, Tennessee, South Carolina, Mississippi, and Maryland—have repudiated the old declaration of the Supreme Court of Indiana, and have adopted the more modern and rational rule that "any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy." Ætna Life Ins. Co. v. France, 94 U. S. 561, 564, 24 L. Ed. 287; New York Mutual Life Ins. Co. v. Armstrong, 117 U. S. 591, 597, 6 Sup. Ct. 877, 29 L. Ed. 997; Chamberlain v. Butler, 61 Neb. 730, 738, 86 N. W. 481; Crosswel v. Connecticut Indemnity Association, 51 S. C. 103, 28 S. E. 200, 203; Bursinger v. Bank of Watertown, 67 Wis. 75, 83, 85, 30 N. W. 290, 58 Am. Rep. 848; St. John v. Ins. Co., 13 N. Y. 31, 40, 64 Am. Dec. 529; Valton v. Ins. Co., 20 N. Y. 32, 38; Olmsted v. Keyes, 85 N. Y. 593, 598; Steinbach v. Diepenbrock, 37 N. Y. Supp. 279, 280, 1 App. Div. 417; Eckel v. Renner, 41 Ohio, St. 232, 233; Mutual Life Ins. Co. v. Allen, 138 Mass. 24, 31, 52 Am. Rep. 245; Dixon v. National Life Ins. Co., 168 Mass. 48, 49, 46 N. E. 430; Brown v. Greenfield Life Association, 172 Mass. 498, 502, 53 N. E. 129; Martin v. Stubbings, 126 Ill. 387, 18 N. E. 657, 660, 9 Am. St. Rep. 620; Prudential Ins. Co. v.

Liersch, 122 Mich. 436, 81 N. W. 258; Trenton, etc., Ins. Co. v. Johnson, 24 N. J. Law, 576, 585; Vivar v. Knights of Pythias, 52 N. J. Law, 455, 469, 20 Atl. 36, 41; Curtiss v. Ætna Life Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114; Widaman v. Hubbard (C. C.) 88 Fed. 806, 814; Hogue v. Minnesota Packing & Provision Co., 59 Minn. 39, 43, 60 N. W. 812; Brown v. Equitable Life Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; Fitzgerald v. Hartford, etc., Ins. Co., 56 Conn. 116, 13 Atl. 673, 678, 17 Atl. 411, 7 Am. St. Rep. 288; Succession of Hearing, 26 La. Ann. 326, 327; Clark v. Allen, 11 R. I. 439, 443, 23 Am. Rep. 496; Strike v. Wisconsin, etc., Ins. Co. 95 Wis. 583, 70 N. W. 819, 820; Clement v. N. Y. Life Ins Co., 101 Tenn. 22, 46 S. W. 561, 564, 42 L. R. A. 247, 70 Am. St. Rep. 650; Murphy v. Red, 64 Miss. 614, 1 South. 761, 762, 763, 60 Am. Rep. 68; Rittler v. Smith (Md.) 16 Atl. 890, 892, 893; Souder v. Society (Md.) 20 Atl. 137, 138. The provision of the bankruptcy law of 1898 that an insurance policy held by a bankrupt shall pass to his trustee as assets of his estate unless he pays to the trustee the surrender value of the policy demonstrates the fact that the national Congress deemed the rule adopted by the Supreme Court and by the courts of these states the established law of the nation. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]. The courts of Indiana themselves, the courts in which the opposite rule seems to have taken its rise, have lately repudiated it, have followed the trend of the more modern decisions, have adopted the more liberal rule, and have declared that: "When the person himself in good faith makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him, or the assignee of the policy, has any insurable interest in the life of the insured or not. This doctrine is settled by this court, and is in accordance with the decided weight of authority." Milner v. Bowman, 119 Ind. 448, 454, 21 N. E. 1094, 5 L. R. A. 95. This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens and the tendency of the decisions of its courts are to depart more and more from the old rule that choses in action are not assign-

able, to make them more and more the subjects of traffic and of commerce, and to sustain their transfers in the ordinary course of business. The stronger reasons, the decided trend of the decisions of the courts and the great weight of authority, concur to establish the rule that an insurable interest in the assignee of a policy of life insurance is not essential to the validity of the assignment if the party to whom it was originally issued had such an interest, and the assignment is not made as a cover for the issue of a wager policy.

In the case at bar, however, there are still other reasons why the plaintiff in this action cannot recover the proceeds of the policy which lies at the basis of this controversy against the title of the Ware National Bank or of any of the immediate or remote assignees of the German Bank upon the ground that these assignees had no insurable interest in the life of Gordon. In the first place, the administrator of the estate of Melissa Gordon is conclusively estopped from enforcing any such claim by the judgment of foreclosure and sale of the pledge in the action of the German Bank against Melissa A. Gordon and William Gordon. After all the premiums upon this policy had been paid, the Gordons pledged it to the German Bank to secure the payment of the indebtedness of William Gordon to that bank. That indebtedness has never been paid. The German Bank brought an action against Melissa A. Gordon and her husband in a court of general jurisdiction to foreclose the pledge, sell the policy, and apply the proceeds of the sale to the payment of the debt. Melissa A. Gordon and her husband appeared in that action, admitted the indebtedness and the pledge, and consented to the trial of the case. The court adjudged the amount due upon the debt, that the policy should be advertised and sold, that the proceeds of the sale should be applied to the payment of the indebtedness, and that "said defendants and each of them be and they are forever barred of and from having or claiming any lien upon or interest in or to said policies of insurance from and after such sale." On May 29, 1882, the sheriff of the county sold this policy at public vendue under an execution issued upon this judgment, pursuant to an advertisement which he had published, to the highest bidder at the sale, the German Bank;

and that judgment and the sale under it stand unassailed and without modification to the present day. Now, the claim of the plaintiff is not that the sale and the assignment to the German Bank were not valid and lawful, but that the subsequent assignments were void because the immediate and remote assignees of the bank had no insurable interest in the life secured by the policy. The answer is that Melissa A. Gordon was conclusively estopped by the judgment from claiming any interest in the policy or in its proceeds, and the plaintiff, the administrator of her estate, stands in her shoes. He is estopped from presenting or litigating this question.

It is not material to the estoppel that the judgment which works it may have been erroneous; that the court may have been mistaken in the facts, may have misconceived the law, or may have disregarded the public policy of the nation when it rendered it. It is sufficient that it had jurisdiction of the subject-matter of the action and of the parties to it, and in this state of the case the established rule of law is that its judgment upon the merits in an action between the same parties, or between those in privity with them, upon the same claim or demand, is conclusive, whether right or wrong, not only as to every matter offered, but as to every admissible matter which might have been offered, to sustain or defeat the claim presented. Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195; Board of Commissioners v. Platt, 79 Fed. 567, 571, 25 C. C. A. 87, 91. The plaintiff stands in privity with Melissa A. Gordon. He is the administrator of her estate, and has no rights which she did not possess at her death. The Ware National Bank is in privity with the German Bank, and the judgment in the case of the German Bank against Melissa A. Gordon and her husband conclusively estops the administrator of her estate from claiming any interest in or lien upon the policy, or the proceeds of the policy, which was the subject of that litigation.

In the second place, the German Bank was a creditor of Gordon, and therefore had an insurable interest in his life. The assignment by Gordon and his wife of the policy on his life to the bank as collateral security for the payment of his debt to it was a lawful pledge of the policy. One of the in-

herent and indispensable elements of a pledge is the right and the power to sell the subject of it to the highest bidder for cash, in order to realize the moneys to pay the debt. The restriction of this power to sell policies of life insurance to those purchasers who may have insurable interests in the lives insured thereby would greatly diminish, if it would not practically destroy, the value of such policies as security for loans or debts. They are now articles of commerce, the frequent subjects of purchase and of sale, and ready and valuable means of obtaining loans and securing obligations. The policy of the nation is to enlarge, not to restrict, commerce in choses in action. The conceded proposition that a pledge of a policy of life insurance to a creditor as security for a debt is lawful and valid carries with it the inevitable corrollary that such a pledge vests in the pledgee the right and the power to sell and to assign the policy to the highest bidder to obtain money to satisfy the debt, whether that bidder has an insurable interest in the life secured by the policy or not. Our conclusion is that the lawful pledgee of a policy of life insurance has the right and the power to sell the policy to the highest bidder for the purpose of realizing money to satisfy the debt, and that the immediate and remote assignees under such a sale take good title to the policy and to its proceeds, although they may have no insurable interest in the life protected by the policy.

Because the assignments in this case were not made as covers for wager policies, but in good faith in the ordinary course of business, and no insurable interest in the assignees was essential to their validity; because the administrator of the estate of Melissa A. Gordon was conclusively estopped by the judgment in the case of the German Bank against her from claiming any interest in or lien upon the policy or its proceeds; and because the lawful pledgee of the policy had the right and the power to sell and to assign it to one who had no insurable interest in the life protected by it for the purpose of raising money to satisfy the debt it secured—the Ware National Bank was entitled to the proceeds of the policy in controversy, and the judgment below is affirmed.

HENRY et al. v. THOMPSON.

Court of Chancery of New Jersey. Oct. 25, 1910. 78 Atl. 14.

Assignment of Interest in Policy—What Law Governs.

The controversy in this case is over the proceeds of an insurance policy issued on the life of Frederick A. Prince. By the terms of the policy, the company insured his life for the sole use of his wife, Mary L. Prince, and agreed "to pay the amount of the said insurance at their office in the city of New York to the said assured for her sole use if living, and, if not living, to the children of Mary L. and Frederick A. Prince, or their guardian if under age, for their use, or, if there be no such surviving children, then to the executors or administrators of the said Frederick A. Prince in conformity with the statute of the State of New York." The policy is dated February 7, 1872. On February 12, 1889, Mrs. Prince, the assured, executed an instrument in writing, which is claimed by the defendant to be an absolute assignment of the said policy and the moneys to grow due thereon. That instrument is in the following words: "For one dollar to me in hand paid, and for other valuable considerations (the receipt of which is hereby acknowledged) I hereby assign, transfer and set over all my right, title and interest in policy No. 25509 on the life of Frederick A. Prince, issued by the Washington Life Insurance Company of New York, to Sarah E. Moody, said policy being originally to Mary L. Prince wife of Frederick A. Prince of Jersey City, Hudson County, New Jersey; and for the consideration above expressed I do also for myself, my executors and administrators guarantee the validity and sufficiency of the foregoing assignment to the above named assignee, h—— executors, administrators and assigns, and their title to the said policy will forever warrant and defend. Dated at Jersey City, N. J., this 12th day of February, 1889. In the presence of C. C. Jewell. [Signed] Mary L. Prince." Across the left-hand end of the paper upon which this so-called assignment was written appears the following: "Assignment of wife's policy. I hereby

consent to the assignment of the within policy by my wife. [Signed] Frederick A. Prince." No children were ever born to Mr. and Mrs. Prince. After the execution of the alleged assignment Mrs. Prince died, leaving her husband surviving her. Subsequently Mr. Prince died. The executors of his will are the complainants in this suit. Mrs. Moody, the alleged assignee of the policy, died January 2, 1907, prior to the death of Mr. Prince. The administrator of her estate is the defendant.

The manual execution and delivery of the alleged assignment were conceded, and no question was made concerning the consideration. When the policy matured by the death of Mr. Prince, the parties complainant and defendant executed releases to the company and surrendered the policy, whereupon the company paid the proceeds into a trust company as depository for whom it might concern.

Howell, V. C. (after stating the facts as above). At the argument the question was mooted whether the transaction under examination should be governed by the law of New York or by the law of New Jersey. The policy itself was issued in New York and was made payable there, and probably, as between the company and the beneficiary, it would be held to be a New York contract, but, inasmuch as the company has discharged its obligation to the parties, the question appears to be of no importance. It was likewise argued that the so-called assignment was governed by the law of New York for the reason that the policy was a New York contract. The evidence shows that all the parties were domiciled in New Jersey at the time of the assignment and in these circumstances the cases hold that the contract is governed by the law of this state. I refer to the case of Cooper v. Philadelphia Worsted Co., 68 N. J. Eq. 622, 60 Atl. 352, a case which relates to the passing of the title to tangible chattels; and to the case of Miller v. Campbell, 140 N. Y. 457, 35 N. E. 651, in which the Court of Appeals of New York held that the validity of an assignment of an insurance policy depended upon the capacity of the assignor to make it under the laws of the state in which he was domiciled. But, inasmuch as the statutes of both New York and New Jersey permit the assignment of a life

insurance policy by a married woman, this question does not appear to have any special importance.

The case then turns upon the legal effect of the instrument itself and of the nature of the right, title, and interest of the assignor in the policy. The general course of decision is to the effect that a policy of life insurance on the life of a husband which is payable to the wife for her sole use, if living, and, if not living, to her children, or if there be no children, etc., gives to the wife merely a contingent interest, which is determined and ended by her death prior to the death of her husband; that a mere assignment of the policy by her, even with her husband's consent, would be of no avail; and that the contingency can only ripen into a certainty by her survival of her husband. This was held in Herr v. Reinoehl, 209 Pa. 483, 58 Atl. 862; Bradshaw v. Mutual Insurance Co. of New York, 187 N. Y. 347, 80 N. E. 203; Knickerbocker Life Insurance Co. v. Weitz, 99 Mass. 157; Connecticut Mutual Life v. Burroughs, 34 Conn. 305, 91 Am. Dec. 725.

There are, however, two elements in this case which take it out of the more general rule, and they are, first, the intention of the parties as manifested in the instruments signed by them to make a complete disposition of the policy and insurance money; and, second, the guarantee made by Mrs. Prince of the validity and sufficiency of the assignment and the warranty of Mrs. Moody's title by her. It is familiar doctrine that if one conveys real estate with a covenant of warranty, and that title turns out to be defective and the warranter afterwards has cast upon him a good title, the warranty will estop him from asserting his good title as against his former grantee. The same rule applies to the warranty contained in the instrument signed by Mrs. Prince. If the title to the policy had subsequently become complete in her, she would not be permitted to make it the foundation of a claim for the policy. Kane v. Lodor, 56 N. J. Eq. 268, 38 Atl. 966. It may therefore be said that whatever right Mrs. Prince had or might at any time in the future have was transferred to Mrs. Moody by the assignment and warranty in question. There being no children of the marriage, the only persons who were or could be interested in the policy were Mr. and Mrs. Prince.

His consent that she should make a simple assignment might not be sufficient to carry the title, but when he consented that she should not only transfer her right, title, and interest, but should also warrant the title to the assignee, the conclusion must be that he disposed of his interest in the policy in his lifetime or permitted his wife to so dispose of it, and that, therefore, his personal representative takes nothing.

The result is that the decree must be in favor of the defendant, but before a decree is entered the trust company, which is the depository of the moneys in question, should be made a party to the suit in order that the decree may operate directly upon the fund in its hands. As the record stands now, no decree could be made which would bind the trust company.

RITTER v. MUTUAL LIFE INSURANCE CO.

Supreme Court of the United States, 1898. 169 U. S. 139.

Suicide as a Defense.

The defendant company issued a number of policies on the life of William M. Runk, conditioned to pay his executors, administrators, or assigns, upon the death of said Runk, the amount designated in the policies. The defense was that Runk committed suicide. The applications for the policies each contained a warranty that, "Runk would not die by his own account when sane or insane within two years."

Mr. Justice Harlan delivered the opinion of the court.

* * *

No error of law having been committed in respect of the issue as to the insanity of the assured, it is to be taken as the result of the verdict that he was of sound mind when he took his life.

This brings us to the question whether the insurance company was liable—assuming that it was not a part of the contract enforceable in Pennsylvania, that the assured should "not

die by his own act whether sane or insane", within two years from the date of the policy.

It is contended that the court erred in saying to the jury, as in effect it did, that intentional self-destruction, the assured being of sound mind, is in itself a defence to an action upon a life policy, even if such policy does not, in express words, declare that it shall be void in the event of self-destruction when the assured is in sound mind. But is it not an implied condition of such a policy that the assured will not purposely, when in sound mind, take his own life, but will leave the event of his death to depend upon some cause other than wilful, deliberate self-destruction? Looking at the nature and object of life insurance, can it be supposed to be within the contemplation of either party to the contract that the company shall be liable upon its promise to pay, where the assured, in sound mind, by destroying his own life, intentionally precipitates the event upon the happening of which such liability was to arise?

Life insurance imports a mutual agreement, whereby the insurer, in consideration of the payment by the assured of a named sum annually, or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits, and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance. The results of that experience are disclosed by standard life and annuity tables showing at any age, the probable duration of life. These tables are deemed of such value that they may be admitted in evidence for the purpose of assisting the jury in an action for personal injury, in which it is necessary to ascertain the compensation the plaintiff is entitled to recover for the loss of what he might have earned in his trade or profession but for such injury. Vicksburg & Meridian Railroad v. Putnam, 118 U. S. 545, 554. If a person should apply for a policy expressly providing that the company should pay the sum named if or in the event

the assured, at any time during the continuance of the contract, committed self-destruction, being at the time of sound mind, it is reasonably certain that the application would be instantly rejected. It is impossible to suppose that an application of that character would be granted. If experience justifies this view, it would follow that a policy stipulating generally for the payment of the sum named in it upon the death of the assured, should not be interpreted as intended to cover the event of death caused directly and intentionally by self-destruction whilst the assured was in sound mind, but only death occurring in the ordinary course of his life.

That the parties to the contract did not contemplate insurance against death caused by deliberate, intentional self-destruction when the assured was in sound mind, is apparent from the "provisions, requirements, and benefits" referred to in and made part of the policy. They show that the policy was issued on the twenty-year distribution plan, and was to be credited with its distributive share of surplus apportioned at the expiration of twenty years from the date of issue; that, after three full annual premiums were paid, the company would, upon the legal surrender of the policy, before default in the payment of any premium, or within six months thereafter, issue a non-participating policy for a paid-up insurance, payable as provided, for the amount required by the provisions of the New York statute of May 21, 1879, Laws of New York, c. 347; that the assured was entitled to surrender the policy at the end of the first period of twenty years, "and the full reserve computed by the American table of mortality, and four per cent interest, and the surplus, as defined above, will be paid therefor in cash;" that if the assured surrendered the policy the total cash value at the option of the policyholder should be applied "to the purchase of an annuity for life, according to the published rates of the company at the time of surrender;" that after two years from the date of the policy the only conditions that should be binding on the holder of the policy were that "he shall pay the premiums at the time and place and in the manner stipulated in the policy, and that the requirements of the company as to age, and military or naval service in time of war, shall

be observed;" that in all other respects, if the policy matured after the expiration of two years, the payment of the sum insured should not be disputed; and that the party whose life was insured should always wear a suitable truss. These provisions of the contract tend to show that the death referred to in the policy was a death occurring in the ordinary course of the life of the assured, and not by his own violent act designed to bring about that event.

In the case of fire insurance it is well settled that although a policy, in the usual form, indemnifying against loss by fire, may cover a loss attributable merely to the negligence or carelessness of the insured, unaffected by fraud or design, it will not cover a destruction of the property by the wilful act of the assured himself in setting fire to it, not for the purpose of avoiding a peril of a worse kind, but with the intention of simply effecting its destruction. Much more should it be held that it is not contemplated by a policy taken out by the person whose life is insured and stipulating for the payment of a named sum to himself, his executors, administrators, or assigns, that the company should be liable, if his death was intentionally caused by himself when in sound mind. When the policy is silent as to suicide, it is to be taken that the subject of the insurance, that is, the life of the assured, shall not be intentionally and directly, with whatever motive, destroyed by him when in sound mind. To hold otherwise is to say that the occurrence of the event upon the happening of which the company undertook to pay, was intended to be left to his option. That view is against the very essence of the contract.

There is another consideration supporting the contention that death intentionally caused by the act of the assured when in sound mind,—the policy being silent as to suicide—is not to be deemed to have been within the contemplation of the parties; that is, that a different view would attribute to them a purpose to make a contract that could not be enforced without injury to the public. A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made

the foundation of its judgment. If, therefore, a policy—taken out by the person whose life is insured, and in which the sum named is made payable to himself, his executors, administrators, or assigns,—expressly provided for the payment of the sum stipulated when or if the assured, in sound mind, took his own life, the contract, even if not prohibited by statute, would be held to be against public policy, in that it tempted or encouraged the assured to commit suicide in order to make provision for those dependent upon him, or to whom he was indebted.

Is the case any different in principle if such a policy is silent as to suicide, and the event insured against—the death of the assured—is brought about by his wilful, deliberate act when in sound mind? Light will be thrown on this question by some of the adjudged cases, having more or less bearing upon the precise point now before this court for determination.

For the reasons we have stated, it must be held that the death of the assured, William M. Runk, if directly and intentionally caused by himself, when in sound mind, was not a risk intended to be covered, or which could legally have been covered, by the policies in suit.

The case presents other questions, but they are of minor importance, and do not effect the substantial rights of the parties.

We perceive no error of law in the record, and the judgment is affirmed.

COWMAN et al v. ROGERS.

Court of Appeals of Maryland. 73 Md. 403.

Death in Common Disaster. Survivorship.

McSherry, J. In the appalling and disastrous flood, which made desolate the Conemaugh valley in the state of Pennsylvania, on May 31, 1889, Walter E. Hoopes, his wife, Maria R. Hoopes, and their two children, were swept away, and

perished. Mr. Hoopes' life was insured at the time in the Order of the Golden Chain, a beneficial association, and the certificate was payable, upon his death, to his wife. The regulations of the association provide that, if the beneficiary named in the certificate should die in the life-time of the member, and if the latter should make no other disposition of the benefit, it shall be paid to the member's widow; if no widow, then to his children; if no widow or children survive him, then to his mother; and, if she be dead, then to his father; and failing all these, then to the brothers and sisters of the insured. The Order of the Golden Chain filed a bill of interpleader against the several claimants of the fund, and brought the amount payable under the certificate into the circuit court of Baltimore city. The claimants of the fund are Mrs. Cowman, a sister of Walter E. Hoopes, and G. Lloyd Rogers, administrator of Maria R. Hoopes, and also administrator of the two children of Mr. and Mrs. Hoopes. The court decreed that the fund belonged to the administrator of the children, and from that decree Mrs. Cowman and the administrator of Mrs. Hoopes have each appealed. The only evidence in the record is the testimony of a single eyewitness, the sole survivor of the nine persons who were in the dwelling of Mr. Hoopes at the time the flood demolished it. From that testimony, it appears that Mr. and Mrs. Hoopes, their two children, a sister of Mrs. Hoopes, Mr. Smith, the witness, his wife and two children, were occupants of a frame house in the village of Woodvale, near Johnstown; that Mr. and Mrs. Hoopes and Mr. Smith were in the parlor on the first floor on the day of the disaster, and that Smith, seeing through the windows the waters rising rapidly on the outside, rushed out of the room, leaving Mr. and Mrs. Hoopes there, and made his way to the second story, where his wife and children, and the children and sister of Mrs. Hoopes, then were; that he hurried all of them up the stairway, carrying his infant in his arms, and when they reached the attic steps, the roof parted and fell, killing the child he was holding, breaking his own arm, and precipitating all of them into the water. Every inmate of the house, except the witness, was lost.

By the Roman law, if a father and son perished together in the same shipwreck or battle, and the son was under age of puberty, it was presumed that he died first, but, if above that age, that he was the survivor, upon the principle that, in the former case, the elder is generally the more robust, and, in the latter, the younger. The Code Napoleon had regard to the ages of 15 and 60, presuming that, of those under the former age, the eldest survived, and that, of those above the latter age, the youngest survived. If the parties were between those ages, but of different sexes, the male was presumed to have survived; if they were of the same sex, the presumption was in favor of the survivorship of the younger. By the Mahometan law of India, when relatives thus perish together, it is to be presumed that they all died at the same monent; and such also was the rule of the ancient Danish law. But the common law, which governs us, knew no such arbitrary presumptions. By that law, where several lives are lost in the same disaster, there is no presumption of survivorship by reason of age or sex, nor is it presumed that all died at the same moment. Survivorship in such a case must be proved by the party asserting it. No presumption will be raised by balancing probabilities that there was a survivor, or who it was. Wing v. Angrave, 8 H. L. Cas. 183; Underwood v. Wing, 4 De Gex, M. & G. 633; Johnson v. Merithew, 80 Me. 111, 13 Atl. Rep. 132; Newell v. Nichols, 75 N. Y. 78; 1 Greenl. Ev. §§ 29, 30; Best, Ev. 304; 2 Whart. Ev. §§ 1280-1282; 2 Kent, Comm. 572.

Whether Mr. and Mrs. Hoopes were drowned, or were killed by the falling of the house, and whether their children were also drowned, or were crushed by the shattered timbers of the building, no human being can tell. Whether the wife survived the husband, or the husband the wife, or whether, both expired simultaneously, may be subjects for speculation and conjecture, but can never be proven or known. Whether their children survived them, or died before their parents, is shrouded in equally impenetrable uncertainty. As observed by the Lord Chancellor, in Underwood v. Wing, supra: "We may guess, or imagine or fancy, but the law of England requires evidence." If the parents were drowned, and the chil-

dren were killed by the falling roof, it is possible the former survived their offspring for a brief but scarcely appreciable space of time. If, on the other hand, parents and children lost their lives by the crushing of the building, it is more than probable that all of them perished at once. If we were to draw inferences from the probable duration of life after a person has been submerged, those inferences would be at best only speculative, and necessarily uncertain and unsatisfactory; and, in regard to the husband and wife, who, when last seen alive, were both in the parlor of their home, there is not the faintest shadow of a fact upon which to base even a conjecture as to survivorship. The only thing which is certain is that all perished in a common catastrophe. The funds now in the circuit court are not assets of Mr. Hoopes, (Red Men v. Clendinen, 44 Md. 434,) and the sucessful assertion of Mrs. Cowman's claim to them depends, under the regulations of the Order of the Golden Chain, upon her being able to show satisfactorily, though not with absolute certainty, that the beneficiary named in the certificate died in the lifetime of Mr. Hoopes; not only so, but she must show further that Mr. Hoopes' two children also died before the death of their father. There is no evidence, as we have already stated, to establish these necessary conditions, and there are no presumptions which can be appealed to to supply the place of such evidence. Were it to be granted that the children expired first, there is absolutely nothing to indicate that Mrs. Hoopes predeceased her husband. Only in the event of her death in his life time do the funds go over to some one else. Her death in his life time is therefore a condition that must exist, and must be shown to exist, before the contingent right to any subsequently entitled beneficiary can possibly ripen into a perfected claim. In other words her title under the certificate, as the selected beneficiary, can only be displaced by affirmative evidence that her husband survived her. Those who claim the funds as against her apparent title (who therefore, seek to displace that title—) must show, by competent and sufficient evidence, that she died before her husband did. If they fail to do this, they necessarily fail to establish their claim to the fund. Now this is pre-

cisely the situation in which Mrs. Cowman stands, and which the administrator of the deceased children also occupies. Mrs. Hoopes was the beneficiary named in the certificate. Her representative has a prima facie title to the fund. That title can only be diverted by evidence showing that she died before her husband. They are both dead, and both died in the same disaster. There is no proof and there is no legal presumption as to which one died first, or as to their having died simultaneously. Until it is shown that she died before her husband, the fund is payable to no one else, other than her representative, because it is only in the event of the death of the nominated beneficiary in the lifetime of the assured that others can possibly take. Until proof of her having so died is first furnished, her prima facie title cannot be displaced, and nothing found in the record is sufficient to displace it. It follows then that so much of the decree as awarded the funds to the administrator of the children must be reversed, and so much of the decree as denied the relief sought by Mrs. Cowman must be affirmed, and the case will be remanded, that another decree may be assigned awarding the funds to the administrator of Mrs. Hoopes.

Contra. See case of Mary H. Willbor et al. 20 R. I. 126.

Note. The insured held a certificate in a benefit association, which was payable to his wife, and in the event of her death, the by-laws of the society provided that the policy should be payable to his heirs. The insured and his wife met their death in the burning of their dwelling. *Held* that in the absence of further proof the evidence established that both died at the same time, and that, in the absence of proof that she survived her husband, her interest did not become vested and therefore her heirs would not take by decent. Balder v. Middeke, 92 Ill. 227.

FILMORE v. METROPOLITAN LIFE INS. CO.

Supreme Court of Ohio. May 1910. 82 Ohio, 208.

Death of Insured, Caused by Beneficiary.

Crew, J. The plaintiff in error, Elmer G. Filmore, as the beneficiary under a policy of life insurance issued to Emma Filmore, his wife, by defendant in error, the Metropolitan Life Insurance Company, brought suit against said company in the court of common pleas of Clark county, Ohio, to recover the sum of $239, with interest thereon from September 3, 1906, which sum he alleged in his petition was due him as such beneficiary under the policy of insurance so issued by said company. For answer to plaintiff's petition, the insurance company pleaded two defenses, the first of which was a general denial, and the second was in the words and figures following, to wit: "For a second cause of defense to the petition, this defendant says that on the 3d day of September, 1906, the said plaintiff murdered his said wife, Emma Filmore, in the city of Springfield, county of Clark, state of Ohio; that on the 25th day of October, 1906, he was indicted by the grand jury of said county for manslaughter on account of the killing of his said wife, and on the 31st day of December, 1906, he was convicted of said crime, and on February 25, 1907, he was sentenced by the court of common pleas to six years' hard labor in the Ohio Penitentiary, at Columbus, Ohio, where the said plaintiff is now confined. Defendant says that, plaintiff having caused the death of the said assured, as herein set forth, he is estopped from asserting any claim as beneficiary under said policy. Defendant, having fully answered, prays to be hence dismissed, with its costs." To this defense a demurrer was interposed by the plaintiff, Elmer G. Filmore, on the ground that the facts therein stated were insufficient in law to constitute a defense. This demurrer was overruled by the court of common pleas, and, the plaintiff not desiring to plead further, judgment was entered dismissing his petition. This judgment of dismissal was subsequently affirmed by the circuit court, and the plain-

tiff in error now asks that this judgment of affirmance be reversed by this court.

The sole question here presented is as to the legal sufficiency, against a general demurrer, of this second defense as pleaded in defendant's answer. It is conceded by counsel for plaintiff in error to be the well settled and established rule of law that a beneficiary under a policy of life insurance is without right to recover thereon, where the death of the insured has been intentionally caused by the act of such beneficiary; but it is contended in the present case that the second defense of defendant's answer is lacking in essential allegation, and is fatally defective, because it contains no direct or sufficient averment that the killing of the assured by Elmer G. Filmore, the beneficiary under said policy, was an intentional killing. That such objection is purely technical, and in the present case wholly without merit, is apparent, we think, from a consideration of the character and legal effect of the matter pleaded and the allegations made in said second defense. One of the express averments found in this second defense is that the plaintiff, Elmer G. Filmore, murdered his wife, Emma Filmore, who was the assured in the policy of insurance upon which he was seeking to recover, and while it is true that neither the circumstances of the killing nor the constituent elements of the crime thus charged are pleaded with the particularity that would be necessary in an indictment charging the same crime, it is equally true that in an answer in a civil action such particularity of statement is not required; but it is sufficient if, in such pleading, the matter constituting the defense be stated "in ordinary and concise language." Section 5066, Rev. St. Murder, being specifically defined by statute in Ohio, is a term or word of technical significance and determinate legal meaning. Hence the averment in an answer in a civil suit that the plaintiff therein murdered his wife is not the averment of a mere conclusion, but is the allegation of a determinate and issuable fact, which, if denied, could not be supported by proof merely of an unintentional or involuntary killing; for while in this state, under our Criminal Code, there are two degrees in the crime of murder, first and second,

the purpose or intent to kill is made by statute an essential element of each, except only in the case of death caused from maliciously placing an obstruction upon a railroad track, etc. Section 6809, Rev. St. Wherefore it follows that the allegation, in the second defense of defendant's answer in this case, that the plaintiff, Elmer G. Filmore, murdered his wife, is tantamount to an allegation that he intentionally killed her, and the term "murder," employed therein by the pleader to designate and define the plaintiff's act, itself necessarily imports that such killing was unlawful and felonious. And as said by Mr. Justice Field in N. Y. Mut. Life Ins. Co. v. Armstrong, 117 U. S. 600, 6 Sup. Ct. 881, 29 L. Ed. 997; "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired."

In the case of Schreiner v. High Court of Illinois Catholic Order of Foresters, 35 Ill. App. 576, cited and relied upon by counsel for plaintiff in error as supporting their contention in the present case, the court also clearly recognizes the principle, applicable to all contracts of insurance, that the insured or beneficiary cannot under such contract receive indemnity for a loss that he himself has intentionally brought about; the second paragraph of the syllabus in that case being as follows: "There can be no recovery in an action founded upon intentional wrong. The beneficiary in an insurance policy cannot recover, where the death of assured has been intentionally caused by his act."

For the reasons hereinbefore stated, we are of the opinion that in the case at bar the allegation of defendant's second defense that the plaintiff murdered his wife should be construed as pleading an intentional killing, and, therefore, as sufficient against a general demurrer. The view we have taken as to the legal effect of this averment renders unnecessary a consideration of the other averments of said second defense.

Judgment affirmed.

Note. The policy was payable to the wife of the insured.

He murdered his wife, and then took his own life. Held that his estate was not entitled to the proceeds of the policy; further, that the proceeds of the policy should be distributed as a part of the wife's estate. Box v. Lainer, 2 Tenn. Ch. App. 1.

HOLMES v. GILMAN.

Court of Appeals of New York. June 1893. 138 N. Y. 369.

Premium Paid with Partnership Money.

Peckham, J. It is stated in the order which reverses the judgment herein that it is reversed upon questions of fact as well as of law. In such case it is the duty of this court to review the determination of the court below upon both questions of fact and of law. Code Civil Proc. § 1338. A careful review of the case convinces us that the findings of fact made by the referee are amply sustained by the evidence, and that the judgment should not be reversed on the facts. We are confirmed in the correctness of this view upon a perusal of the opinions delivered by the learned judges at the general term. We there find that the order reversing the judgment upon questions of fact as well as of law was formal merely, the judgment being actually reversed because the court below took a different view of the law from that adopted by the referee upon his own findings of fact.

The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds, and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and identified, and provided the rights of bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased

value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail. It is a question of title. Van Alen v. Bank 52 N. Y. 1; Newton v. Porter, 69 N. Y. 133; Ferris v. Van Vechten, 73 N. Y. 119; Cavin v. Gleason, 105 N. Y. 256, 260, 11 N. E. Rep. 504; In re Hallett's Estate, 13 Ch. Div. 696. It is somewhat akin to the principle decided in Silsbury v. McCoon, 3 N. Y. 379, where corn was wrongfully taken from its owner, and converted into whiskey. The court held the property was not changed in the hands of the wrongdoer, and the whiskey belonged to the owner of the original material, no matter how much it had been increased in value. The case of Pennell v. Deffell, 53 Eng. Ch. 372, 388, 389, discusses the principle as thus stated, and agrees to it. That a partner occupies a fiduciary position with regard to his copartners and the funds of the firm, and will not be permitted to make a personal profit out of the use of such funds, is, I think, clearly established. 1 Lindl. Partn. (2d Amer. Ed.) 303; Featherstonhaugh v. Fenwick, 17 Ves. 298; Anderson v. Lemon, 8 N. Y. 236; Mitchell v. Reed, 61 N. Y. 123; Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. Rep. 924. Although partners do not, in the strict sense of the term, occupy the position of trustees towards each other and towards the firm funds, yet the position is one of a fiduciary nature, calling for the maintenance and exercise of the greatest good faith between them. Such a relationship authorizes the same remedy on behalf of the wronged partner as would exist against a trustee, strictly so called, on behalf of a cestui que trust. Per Jessel, M. R., in Re Hallett's Estate, 13 Ch. Div. 696, 712. While legally incorrect to describe the fraudulent abstractions made by Gilman of the funds of the firm as embezzlements, the description is harmless. It was a monstrous and gross breach of the duty he owed the firm, and the right of the firm to follow the funds is not affected because the act could not be regarded in law as an embezzlement. The right to follow the funds springs from the fiduciary nature of Gilman's position with regard to them. These general positions are not really denied by the defendant. It is claimed, however, that

the tracing and identification of the funds have not been sufficiently proved in fact, and it is also urged that there has been an actual mingling of firm funds with the private funds of Gilman in the purchase and maintenance of the policies. I have looked carefully through the evidence upon these questions of fact, and I think the findings of the referee are fully sustained, and that no exception can prevail on such grounds. If these preliminary questions be decided against him the counsel for defendant then urges that the rule clearly is, if the trust fund has become mingled with money or property of the trustees or others, equity impresses the proceeds with a trust to an amount equal to the original trust fund and interest, and will go no further. He then claims that the firm funds which went to the purchase of the policies and the payment of the annual premiums were mingled with the property right of the wife, called her "insurable interest" in her husband's life, and so the policies were not wholly the result of the use of those firm funds, and therefore the plaintiff can have only a lien on the policies or the moneys arising from their payment, to the amount of the premiums paid with the firm funds, and the interest thereon. This is really the chief question in the case.

Where moneys have been misapplied and have been used as a portion of a larger amount, which has been invested in other property, the property thus acquired does not, as a whole, belong to the owner of the moneys misapplied. It does not belong to him because it has not been purchased or acquired wholly with his money or funds, and hence it is that such property is held charged with a lien at least to the amount of the trust funds invested in it. It is not necessary to here decide it, because we take another view of the facts, but I am not at all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property, which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs

to the trustee, and that only the original sum wrongfully taken, and interest, can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If, in such case, the cestui que trust were not allowed to at least participate proportionately in this increased value, it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of the trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property at the option of the cestui que trust, in the proportion which their various contributions bore to the sum total invested. In this case, however, the defendant is enabled to claim a mingling of funds and property only by treating the right of a wife to insure the life of her husband for her benefit as a species of property which has been mingled with the funds of the firm, the result of the combination being the procurement of the policies.

We do not regard this right as property in any such light as to bring the case within the principle of the authorities upon the subject of a mingling of funds in the purchase or acquisition of other property. The right of a wife to insure the life of her husband for her own benefit is not property. It is more in the nature of a power or a privilege to make a valid contract. It is a status and not a property right. The common law upon motives of public policy held that there must be what was termed an "insurable interest" in the life which was insured, or else the policy was a dangerous kind of a wager, and therefore void. To take a policy out of such a class, it was necessary to show that the insured had some interest in the continuance of the life of the cestui que vie. Who had such an interest as to give a right of insurance was frequently a matter of some discussion and of possible doubt. It may not even now perhaps be said that the precise nature, character, and extent of the interest in another's life, which shall render that life insurable, have been formally and plainly laid down. It is said by the federal supreme court, that one essential is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of

a life in which the insured has no interest. Insurance Co. v. Schaefer, 94 U. S. 457, 460. An interest which is insurable must be an interest in favor of the continuance of the life, and not an interest in its loss or destruction. If any person could be thought to have an interest in the continuance of the life of another it would be a wife in the life of her husband. Judge Allen, in Baker v. Insurance Co., 43 N. Y. 283, regarded the question as decided that a wife had at common law an insurable interest in the life of her husband. Judge Andrews held to the same effect in Brummer v. Cohn, 86 N. Y. 11, 14. These cases favor the view that the statutes upon the subject of the insurance of the husband's life in favor of his wife, while it regulates, does not create, the right. I do not intimate that, if the statute created the right, it would in any way alter its nature. That such a policy was valid at common law simply makes it clearer that it is the nature of the relationship between man and wife that makes the policy valid, and relieves it from the objection that it is a wager policy. That relationship is not property in any fair sense of the term. It creates an insurable interest in the life of another, of a nature the same as a parent has in a child, or a child in a parent; that is, an interest in the preservation of the life, and not in its destruction. Being so circumstanced, a policy of insurance upon such life is not a wager policy, and is therefore a valid policy. It is the same question, but it may perhaps appear a little clearer when it is asked whether the power or privilege of a parent or child or creditor to insure the life of his parent or child or debtor is property. A man has an insurable interest in his own life. If he take trust funds and procure such insurance,, has he thereby mingled those funds with other property, i. e. with his right to insure his own life? And can it be said that the policy is the product of such mingled funds and property, so that nothing but the original amount of the trust funds and interest can be recovered back from the estate? The fact is apparent that a policy of insurance upon a life is not a policy of indemnity. The sum named in the policy is to be paid when the insured life has ceased, no matter how really valueless, such life may have in the meantime become. The power of

the wife to procure insurance is not in the least unfavorably affected by the fact that insurance in her favor has already been secured. As was said by Shaw, C, J., in Loomis v. Insurance Co., 6 Gray, 396, the amount of the insurance is immaterial. The premium is computed, upon the law of averages, to be the exact equivalent for the risk. So, if insurance had been taken out by the husband on his life in the wife's name, she could herself take out more upon just as favorable terms, and just as expeditiously as if none had been taken. No one company might desire to go above a certain amount upon any one risk, but the ability to procure further insurance is practically unrestrained. The wife has therefore suffered no loss by the original procurement of this insurance, and its subsequent maintenance unknown to her, so long as the premiums have not been paid with her moneys or in any way from her estate. In other words, her property has not been used for any purpose. Her power to obtain valid insurance upon his life remained wholly unimpaired and unaffected by the insurance already obtained. The fact that she had what is termed an "insurable interest" was only material for the purpose of upholding the validity of the insurance in question. I cannot see how it can be regarded as property in any event. That a life insurance policy has not the features of a contract of indemnity, and is not such a contract, has been unquestioned for a number of years. Rawls v. Insurance Co., 27 N. Y. 282; Olmstead v. Keyes, 85 N. Y. 593.

The case of these policies is very much like that in Baker v. Insurance Co., supra, where Judge Allen said the insurance was effected by the husband for the benefit of his wife, and as a provision for her in case of his death. It was there stated that the case would not be changed if the policy were regarded as having been procured by the wife, because the husband was in truth the actor, and represented the wife, and she, in claiming the benefits of the policy, necessarily ratified and confirmed the compact as it was made, and with all its terms and conditions. Therefore this case is to be looked at with reference to the fact that every dollar of the moneys which procured and maintained these policies in existence

belonged to the firm represented by the plaintiff, and that Gilman had no more right to invest or use these funds in the manner he did than would any third person who had procured them without any right or title. It has been said that the husband, when he procures an insurance for his wife's benefit, acts as her agent, or represents her, and that she has a vested interest in the policies the moment they are delivered by force of the statute permitting them to be made in this form. Whitehead v. Insurance Co., 102 N. Y. 143, 6 N. E. Rep. 267. This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or to his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and by which he violates his obligation to the true owner of the moneys thus used, the wife in such case must claim the policy subject to the means by which the husband procured it, and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the cestui que trust if received by the company in good faith, because it would stand in the position of a bona fide purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate. This principle has, in effect, been decided in New Jersey in the case of Shaler v. Trowbridge, 28 N. J. Eq. 595. It was there held, upon almost identical facts, that there was no public policy which favored the wife at the expense of the principle that trust funds could be followed, and that no profit could in any way arise in favor of the trustee who used them. It also held that the wife could not be permitted to avail herself of the proceeds of policies paid for by her husband with trust funds. It is true, in that case the policies were originally taken out in the name of the husband, and subsequently made payable to the wife, and it is urged that there is a difference in the two cases, because in the New Jersey case it was the husband's insurable interest which was insured, and then assigned, and that in this case it is the wife's interest which was originally insured; but we hold, upon the facts in this case, that the taking out of the policies in the name of

the wife does not alter the principle as to trust funds. The cestui que trust is entitled to follow his funds, and to take the moneys or the policy at his option.

The case of Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. Rep. 41, is not in point. The moneys there used were in truth the property of the husband, although he was insolvent, and he used some of his property to purchase insurance for the benefit of his wife and children. The supreme court held that a policy of insurance taken out by the husband in the name and for the benefit of the wife made the contract a contract with the wife, and that, even though the premiums were paid by the insolvent husband, with moneys which, or some part of which, ought to have been used for the payment of his debts, yet, if there were no fraud as between the wife and the company, the wife could hold the policy as against the creditors of the husband, except the amount which had been wrongfully used in the payment of premiums. If the amount of the husband's estate used to pay premiums were no more than reasonable and moderate under the circumstances, it was further held that the creditors could not recover back the moneys so paid for them, although the husband was, at the time of their payment, insolvent. It was said the interest insured did not belong to the husband or his creditors; that the contracts were not payable to the husband, his representatives, or his creditors; that no fraud on the part of the wife, the children, or the insurance company was shown or pretended; and that there was no gift or transfer of the debtor's property, unless the amounts paid for premiums were to be held as excessive. That is a very different case from the one under consideration. It was no trust fund (within the meaning of that term when used to authorize the following thereof) which went to pay for the policy in that case. The moneys belonged to and were the property of the husband. They might, under certain circumstances, be reached in proceedings after judgment and return of execution, but the title was in the husband, and he used his own property to procure the insurance. Having done so, the policy thus procured became a contract with the wife, and her insurable interest in her husband's

life was thus made effectual. The creditors could not follow the moneys into other property, and demand such property. No principle of following trust funds was involved.

In this case, however, there is the fact which alters and colors the whole transaction, and is fundamental and controlling in its nature, and that fact is that the moneys which procured the insurance were trust moneys, and, although invested in the policies, they were subject at the very moment of such investment to the right of the owner of the funds to follow them into whatever change of form they might assume, and to claim the thing into which they were changed as if it were the original fund. In the case in the federal court the whole matter was discussed with reference to the violation of the statute of Connecticut, based upon the statute of Elizabeth (13 Eliz. c. 5) prohibiting the transfer of the property of an individual in fraud of his creditors. We have a statute to the same effect, 2 Rev. St. p. 137, § 1. The learned chief justice said that the statute was passed to prevent debtors from dealing with their property to the prejudice of their creditors, but dealing with that which creditors irrespective of such dealing could not have touched was within neither the letter nor the spirit of the statute. This was spoken of the insurable interest of the wife, and it was spoken in regard to creditors as that term is generally used. In this case it is not in the simple character of a creditor of Mr. Gilman, or of the defendant Mrs. Gilman, that the plaintiff asks relief. He seeks the aid of a court of equity to enable him, in the character of a cestui que trust, to follow his property which was wrongfully converted by one bearing towards him the obligations of a trustee, and by such trustee invested in these policies, and such cestui que trust now asks, in substance, for his own property, or for the property into which his trust funds were wrongfully converted; and we think he has the right to recover the property which represents and stands in the place of the original trust fund. The case in the federal court is not at all parallel, and is, therefore, no authority against our contention. Whether at common law or under the provisions of our statute the procurement of policies of insurance

in the wife's name, under the facts developed in this case, does not prevent the cestui que trust from following and claiming the trust funds or their proceeds, if the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the cestui que trust, arising out of the husband's breach of trust, we do not decide what might in equity be the different rights of the wife and such cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted over $200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment on the referee's report be affirmed. We simply decide the case now before us. As to other questions discussed in the defendant's brief, we have carefully considered them, and we think there was no error in the result arrived at by the referee. The order of the general term is therefore reversed, and the judgment entered upon the report of the referee is affirmed, with costs to the plaintiff at general term and in this court. All concur. Judgment accordingly.

Accord. State v. Amerman, 121 N. Y. 337, 24 N. E. 819; Central Bank of Washington v. Hume, 128 U. S. 195.

HENDRIE & BOLTHOFF MFG. CO. v. PLATT.

Court of Appeals of Colorado. 1899. 13 Colo. App. 15.

Payment of Premium, Insolvency.

Wilson, J. This is an action brought by a creditor of a deceased insolvent for the purpose of subjecting to the payment of the latter's debts the funds realized from life and accident insurance taken and carried by the latter in favor and for the benefit of his wife, who is the defendant. James H. Platt died on August 13, 1894, and his estate was found to be insolvent. The complaint charges: That, while insolvent, the said Platt carried upon his life, and obtained, life

and accident insurance, in favor of the defendant, as follows, to wit: A Policy of life insurance, for $25,000, in the New York Life Insurance Company of New York, dated January 9, 1890, No. 344,968, with an annual premium of $1,540 payable annually; another policy of life insurance, for $15,000 in the New York Life Insurance Company of New York, dated June 29, 1893, No. 548,481, with a semiannual premium of $391.20 payable semiannually; another policy of life insurance, for $20,000 in the Massachusetts Benefit Association of Boston, Mass., dated, to wit, ———, 1890, with an annual premium of $400, payable annually; another policy of life insurance for $10,000, in the Provident Savings Life Assurance Society of New York, dated, to wit, A. D. 1887, with an annual premium of $275, payable annually; a policy of accident insurance, for $10,000, in the Travelers' Insurance Company of Hartford, Conn., dated, to wit, November 17, 1893, with an annual premium of $50, payable annually; another policy of accident insurance for $10,000 in the Fidelity and Casualty Company of New York, dated, to wit, A. D. 1890, with an annual premium of $42, payable annually; another policy of accident insurance for $5,000 in the Preferred Accident Insurance Company of New York, dated, to wit, about A. D. 1887, with an annual premium of $12 per annum, payable annually; another policy of accident insurance, for $5,000, in the United States Mutual Accident Association of New York, dated about A. D. 1887, with an annual premium of $15 per annum, payable annually; another policy of accident insurance for $10,000 of the Standard Accident Insurance Company of Michigan, dated about December, 1892, with an annual premium of $42, payable annually. That all of said insurance had been paid to the defendant. That at the times during which the indebtedness to plaintiff was incurred, and while the assured was insolvent, he paid out of his own means and money the premiums on the policies taken out prior to said indebtedness; and that "said payments were made for the purpose of placing so much of his means, also the moneys, that upon his death should be payable to this defendant under the said policies, beyond the reach of this plaintiff, for the purpose of hindering and delaying and defrauding this plaintiff in the

collection of the moneys owing them." That the moneys advanced for premiums on the policies between May 27, 1893, and May 31, 1894, were taken from the capital and business of said Platt, and impaired his ability to meet his just debts, and tended to impair the successful operation of said business, as he, the said Platt, and this defendant, well knew: The answer of the defendant denied, inter alia, that any insurance was effected or any premiums paid during the insolvency of the assured, and alleged that, at all the times of such payments, he was wholly solvent. The answer further alleges that, at the time of his death, the deceased was indebted to defendant in a large sum of money, which she had loaned to him about the time of their marriage, in 1884, long prior to the contracting of this indebtedness, and to any charge of insolvency, and that to insure her against the loss of said money, and also for her support and the support of their children, the deceased had agreed to keep his life fully insured in her behalf. It appeared upon the trial that the policy of insurance for $10,000 in the Provident Savings Life Assurance Society of New York was not in favor of the defendant, but that the beneficiary therein was one Sarah A. Keeney, who was a creditor of the decedent, and who had collected the insurance due upon the policy, and, after deducting therefrom the amount of the debt owing to her, had paid the balance to the defendant as executrix, and that the same had been accounted for to the estate of decedent. This balance, amounting to something over $6,000, was credited by the defendant to the estate, and applied to the payment of its debts, she therefore receiving no benefit from it. This policy is therefore eliminated from the consideration of this case. Excluding this, it will be seen that the amount received by defendant on account of life policies was $60,000, the policies on $45,000 of which had been taken in 1890, long prior to the contracting of the indebtedness to plaintiff, and to any attempted proof of insolvency. On account of policies for accident insurance, the defendant received $40,000, the policies for all of which, except $10,000, were issued long prior to the indebtedness to plaintiff. The annual premiums required to be paid on all the policies was, in the aggregate, about $2,500, of which $161 paid the an-

nual premiums on all the accident policies. At the time when this insurance was effected, there were dependent upon the deceased for support his wife, the defendant, and two daughters, one the child of a former marriage.

The questions presented for determination are those of first impression in this jurisdiction, and, it is scarcely necessary to say, are also of first importance. Impressed with this fact, the court has given to them the most thorough consideration, examination, and study, in which work we have been most materially aided by the able, thorough, and exhaustive arguments of counsel on both sides.

In the examination of the question as to how far, in the absence of statute, the fund realized from insurance upon the life of an insolvent debtor can be made chargeable with his debts, we are not aided by a very large number of authorities upon the direct proposition. There are, however, a number of well-considered cases in which the question, in its varying phases as presented, has been considered and determined. The absence of a great number of cases bearing upon the question may be accounted for by the fact that in the great majority of states the question is expressly regulated by statute. In this state, however, there is no statute, except in regard to insurance on the assessment plan. As to the fund realized from this character of insurance only, it is provided by the statute that it shall not be liable for the debt of any certificate holder or beneficiary named therein. Laws 1887, p. 289, § 10.

By the authorities which have adjudicated the question independent of statute, we find three distinct propositions announced: First. That, in the absence of actual fraud, the fund derived from insurance upon his own life by an insolvent debtor in favor of his wife or child or children, dependent upon him, cannot be reached by his creditors, and made subject to the payment of his debts, except, possibly, in certain contingencies, which we will hereafter discuss, the amount of the premiums paid by the insolvent debtor during insolvency. In support of this doctrine, either in whole or in part, are Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41; Appeal of Elliott's Ex'rs, 50 Pa. St. 75; Ætna Nat. Bank v. United States Life Ins. Co., 24 Fed. 770; Bank v. Hume, 3 Mackey, 360;

In re Anderson's Estate, 85 Pa. St. 202; Pence v. Makepeace, 65 Ind. 345; Pinneo v. Goodspeed, 120 Ill. 536, 12 N. E. 196; State v. Tomlinson (Ind. App.) 45 N. E. 1120; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205; Stigler's Ex'x v. Stigler, 77 Va. 163; 2 Bigelow, Frauds, p. 129. To this effect in principle are, also, Forrester v. Gill, 11 Colo. App. —, 53 Pac. 230; McLean v. Hess, 106 Ind. 555, 7 N. E. 567. Another doctrine supported by some authority is that the procurement of such insurance by an insolvent is a voluntary conveyance or gift, which is void as to existing creditors, though no fraud may have been intended, and that the whole of the insurance would be subject to the debts of the insured. The principal authorities in support of this doctrine to which we have been cited seem to be Fearn v. Ward, 80 Ala. 555, 2 South. 114, Transportation Co. v. Borland, 53 N. J. Eq. 282, 31 Atl. 272, and Stokes v. Coffey, 8 Bush, 533. Another line of authorities holds that in such cases the amount of the premiums paid by the insolvent, and that alone, of the proceeds, can be reached by his creditors. We think that the weight of authority is in favor of the doctrine announced by the first line of authorities, and that it is better sustained upon reason and upon principle. The reasoning by which the courts holding to this view support their conclusions commends itself most highly to our judgment. In the first place, it is undoubtedly the law, as held almost if not quite universally, that the policy is the contract of insurance, and that, the moment it is issued, its ownership vests in the beneficiary. The applicant for it, and he who paid the premium which secured it, cannot thereafter change, assign, alienate, or incumber it, or any rights to be secured under it, upon compliance with its provisions. He cannot even defeat it by a refusal to pay the subsequent premiums required, if the beneficiary or any person for her pays them. The contract is between the insurance company and the beneficiary. To this effect are the authorities above cited, and also numerous others to which reference might be made, including the following. Wilburn v. Wilburn, 83 Ind. 55; Yore v. Booth, 110 Cal. 238, 42 Pac. 808; Ricker v. Insurance Co., 27 Minn. 193, 6 N. W. 771; Bliss, Ins. § 318. The payments of subsequent premiums de

not create new contracts, nor, strictly speaking, do they constitute renewals of the insurance contract. They are simply the fulfillment of conditions required by the original contract, a failure to comply with which would work a forfeiture. Besides, the contract is based upon and its fruits finally realized, if at all, because of the insurable interest of the beneficiary in the life of the assured. The latter is equally as essential, and is equally an important consideration of the contract. Upon what principle or theory, then, can it be said that rights based upon this insurable interest, which is an interest or right purely personal to the beneficiary, can inure to the benefit of the creditors of the assured? Can they say to the wife: "Though it is true that this fund was realized upon your insurable interest in the life of your husband, not upon his interest in his own life, nor upon our interest in it as creditors, yet, because he paid the cash premiums required while insolvent, we should subject to the payment of our debts, not only so much of the fund as equals the amount of premiums so paid, which is all he took from his estate, and all of which he deprived us, but we will take the whole fund. We will take back that which he took from us, and also that which could not have been secured without your insurable interest in his life." The questions, in our opinion, suggest their own answer.

Again, the fund, which is the property against which the creditors seek to enforce their claims, has not come into existence, has not become property till after the death of the debtor. How, then, can it be said that he made a voluntary or fraudulent conveyance of that which did not exist during his life? If a creditor's rights would attach to any portion of the proceeds of the insurance, would it not be more reasonable to say that in such case the right of recovery would be limited to the amount of funds so diverted, which in this instance would be the aggregate amount of premiums paid by the insolvent debtor? This would be what he gave to or voluntarily expended for the benefit of his wife. The fund realized by her was not from the payment of the premiums only, but from and by reason of, in addition thereto, her insurable interest in his life which he neither gave nor conveyed to her, and in which he had no interest. In

this state a married woman has a right to acquire, hold, manage, and convey her own separate property, free from any claim of her husband or of his creditors. Suppose that an insolvent husband should give to his wife $1,000, and that such a gift was under such circumstances as to make it manifestly fraudulent against his creditors; and suppose that his wife, by prudent management of the money, and by successful speculation, should, in course of time, acquire property of the value of $5,000. Could it be successfully contended that the husband's creditors could enforce their claims against this property to the full extent of its value? Obviously not. Certainly, in the absence of actual fraud upon the part of the wife, their right would be limited to the amount of the original money gift, with interest. This was what he gave in fraud of the creditors, this, what he took from them. It became none the less her absolute property because she might afterwards be compelled to repay it; and upon no principle of either law or justice could she be required to answer to her husband's creditors for its accretions while it was her property. All which the creditors could have demanded from the debtor was the amount of the gift had he retained it, and certainly this was all which they could demand from the donee or grantee. Upon precisely the same principle it would seem clear that the proceeds of life insurance effected in favor of an insolvent debtor's wife could be chargeable, if at all, with his debts only to the extent that he, while insolvent, had used the funds of his estate to secure and carry the insurance. The contrary might be urged with some force if the insurance arose from a policy taken out by the debtor in favor of his own estate, payable to his executors, administrators, or assigns, and which had afterwards, during insolvency, been assigned to his wife. This question does not, however, arise in this case. In each of the policies here in question the wife of the assured was expressly designated as the sole beneficiary.

In Bank v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, Chief Justice Fuller, speaking for a unanimous court, said, inter alia: "Mr. Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Eliz. c. 5,

and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched, is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And, where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute; and this, even though the debtor may have no deliberate intention of depriving his creditors of a fund to which they are entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. Freeman v. Pope, L. R. 9 Eq. 206. The rule stands upon precisely the same grounds as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of reach of the creditors. Cornish v. Clark, L. R. 14 Eq. 184. But the rule applies only to that which the debtor could have made available for the payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power, because in the latter case the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit. May, Fraud. Conv. 33. It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot; but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance. * * * It is indeed, the general rule that the policy and the money to

become due under it apply the moment it is issued to the person or persons named in it as the beneficiary or beneficiaries, and that there is no power in the person procuring the insurance by any act of his, by deed or by will, to transfer to any other person the interest of the person named. * * * Conceding then, in the case in hand, that Hume paid the premiums out of his own money when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what grounds the creditors—or the administrators, as representing them—can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest was neither the debtor's nor the creditors'. The contracts were not payable to the debtor or his representatives or his creditors. No fraud on the part of the wife or the children or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. * * * But even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belong to the beneficiaries, for the reasons already stated."

Prior to its appeal to the supreme court of the United States, the same case was heard in the supreme court of the District of Columbia. That court, in its opinion, said: "But Mrs. Hume (the beneficiary) did not derive anything by assignment, nothing by transfer. What she claims under this policy never belonged to the estate of her husband, never formed an asset or a basis of credit. The proceeds of the policies stand entirely in a different relation to his estate from a contract directly with himself. He never had any control of them. He never could assign or transfer them. The decisions point uniformly to the conclusion that, the moment a policy of insurance is effected for the benefit of a wife upon the life of her husband, it becomes her property eo nomine, and nobody has control of it but herself. She may assign it, unless there is some public policy against it; and it is just

as much a vested right in the married woman as any other portion of her separate estate. * * * What right have the creditors to what never belonged to the estate? What right have they to a vested right in the married woman for her protection and that of her family? What right have they to a species of property that never existed until after the death of the husband? We presume that no creditor of Thomas L. Hume would dare to stand up and make the statement that he had been misled by these policies, or that he had extended credit to him on their strength." In this case, the assured was insolvent at the time the insurance was effected, and the policies issued. In the case at bar, all of the poliices, save two, were issued long prior to the time when there is any suggestion or evidence of the insolvency of the assured.

In Appeal of Elliott's Ex'rs, supra, the question before the court was upon the disposition of the proceeds of a policy originally issued in the name of the husband, and payable to himself or his personal representatives, and, while insolvent, transferred by him to trustees for his wife's benefit. The court held that this policy was properly a part of his estate, and that its transfer while insolvent was void as against creditors, but say: "We are to be understood in thus deciding this case that we do not mean to extend it to policies effected without fraud, directly and on their face for the benefit of the wife, and payable to her. Such policies are not fraudulent as to the creditors, and are not touched by this decision."

In McCutcheon's Appeal, 99 Pa. St. 137, the court reaffirmed the doctrine announced in Appeal of Elliott's Ex'rs, which we have quoted above. This case, it is true, was based largely upon the construction of a statute of the state with reference to the exemption of the proceeds of insurance; but the court held that independent of statute, in case the wife was the beneficiary named in the policy of insurance on the life of her husband, there was no conflict between the statute and the letter or spirit of the statute of Elizabeth. The court said: "There is no anomaly in this, nor any conflict with the letter or spirit of the statute of Elizabeth, because in such cases the policy would be at no time the property of the assured, and hence no question of fraud in its transfer could arise as to his creditors."

In Pence v. Makepeace, supra, the court said: "If, however, it were conceded—which we do not concede—that a creditor of the assured might in any case institute and maintain an action for the recovery of any part of the amount of the policy of insurance procured by the insolvent debtor upon his own life for the benefit of his wife, or family, upon the grounds that the premiums therefor were paid with money which ought to have been applied to the payment of the debt of the assured to such creditor, and that such payment of such premiums by the assured was a fraud upon the rights of such creditor, we are clearly of the opinion that the very utmost which the creditor could possibly recover in such action would be the aggregate amount of the premiums thus paid. The creditor could not in any event derive a profit from or recover aught more than the sums of money actually paid by the debtor in premiums upon a policy of insurance upon his own life, payable to or for the benefit of his wife or any member of his family."

In support of the doctrine contrary to that held by this most respectable array of authority, the two leading cases to which we are cited are Transportation Co. v. Borland, supra, and Fearn v. Ward, supra. It would extend this opinion to an unwarrantable length, and would serve no useful purpose, to discuss in detail these opinions. For the reasons which we have ourselves given, and for those advanced by the courts which we have followed, we think that the doctrine laid down in Bank v. Hume and like cases is more in accordance with law, reason, and justice, and neither the statutes nor judicial precedents in this state being in conflict with it, we prefer to follow it. We will only say that, in reference to the New Jersey case (Transportation Co. v. Borland, supra.) as the base of the argument is laid down the proposition that there can be no difference between the law applicable to the proceeds of a policy where an insolvent father pays the premiums upon a policy of insurance issued upon his life, and payable to his child, and that of the proceeds of a policy originally issued in his own name, but assigned during insolvency to the child. This doctrine, as we have seen, is contrary to the vast preponderance of authority. In this case, too, the opinion was

rendered upon a demurrer to the complaint, which positively alleged that the payments of premiums were made by the assured insolvent debtor, for the purpose of placing so much of his means beyond the reach of his creditors, and for the purpose of defrauding the complainant. The demurrer, of course, admitted the allegations of the complaint to be true.

In Alabama, at the time when Fearn v. Ward was determined, there was a statute which provided in effect that insurance on the life of a husband, in favor of his wife, should be exempt from claims of creditors to the extent only of the amount that an annual premium of $500 would purchase. Under this statute, it had been held that, if this limit was exceeded, the statute intervened, and devoted the excess of insurance to the payment of the assured's debts, on the ground that the statute fixed a limit beyond which the husband could not go in paying premiums from his own funds, which should be appropriated to his creditors. In Fearn v. Ward it was held that this judicial interpretation of the statute could be maintained only on the principle that, without the statutory intervention and exemption, the whole of the insurance would be subject to the payment of the debts of the husband. This would seem to have been considered by the court as a cogent reason in support of its conclusion.

We have also been cited to Stokes v. Coffey, 8 Bush, 533, as maintaining a doctrine contrary to that in Bank v. Hume. As to what was determined by the court in this case, we leave to the court itself, as stated by it in a subsequent opinion. Thompson v. Cundiff, 11 Bush, 570. In its opinion in this case, the court says: "The right of a husband to make provision for his wife, even though he be insolvent and in debt, was left an open question by this court in the cases of Doyle v. Sleeper, 1 Dana, 532, and Stokes v. Coffey, 8 Bush. 533.

We think it clear that the plaintiff in the case before us has no legal right to enforce a claim to the payment of its debt against the proceeds arising from any of the insurance upon the life of the deceased debtor. Col. Platt, unless it be to the extent of the premiums paid by him subsequent to his becoming indebted to plaintiff, and during his insolvency, if insolvent at all, which latter question we will now consider.

There was no evidence tending to show or to raise any legal presumption of Col. Platt's insolvency prior to 1893, and hence our inquiry will be confined to the disposition of the premiums paid during the years 1893 and 1894. As to those paid during the previous years, this plaintiff can have no claim whatever. There was no evidence tending to show any fraudulent intent on the part of either Col. Platt or Mrs. Platt in the payment of the premiums under consideration. Nor was the evidence sufficient to have supported a finding, considering the extensive business operations and large means of the assured, that these payments either caused his insolvency or that of his estate, if it occurred, or had any material or appreciable effect in bringing it about. Under these circumstances, the facts were not shown upon which the law would raise a presumption of fraudulent intent, rendering necessary an inquiry into their motives. We might with great confidence then say, in the absence of proof of fraudulent intent, that the amount of these premiums could not be reached by the creditors, because the case would come within the rule announced in Bank v. Hume, supra. While this is the result of our conclusion, we prefer, however, to base our decision upon broader, and, if possible, more indisputable, grounds.

It clearly appears from the evidence that, at the time of the death of the assured, he was, and had been for a number of years previous, prior to 1893, indebted to his wife, the defendant herein, and the beneficiary in all of these policies of insurance, in a large sum of money. The chief dispute between the parties is as to the amount of this indebtedness. We do not propose to go into the merits of this controversy, because, as will be seen from the view which we take of it, the precise amount is not material. We think it shown beyond a doubt that it was at least equal to about $30,000,—a sum far more than sufficient to have paid all of the premiums during these two disputed years; in fact, more than to have paid all of the premiums paid upon all of the policies of insurance. He had a legal right to prefer her as his creditor, and, as between the parties, we think she is at least equally entitled to the presumption that he was so preferring her. Conceding that he was insolvent during the years claimed, there was

every inducement and reason for his so preferring her, when at the same time, in addition thereto, he would also be providing for the future support of her and his children after his death. Under the evidence, the money loaned or advanced by her to him is equitably as much to be accounted for to her by him, as between his creditors and her, as is the money paid on her account to be accounted for by her. In fact, we think that her equitable rights are superior, because the evidence is undisputed that, at the time she permitted him to become indebted to her, it was with the express agreement on his part that he would at all times keep his life insured in a sufficient amount, not only to repay this indebtedness in full, but also to provide a fund for the support of herself and his children after his death. And, further, the principle of public policy steps in, and furnishes an additional reason. Where the rights of creditors and those growing out of the family relations are in conflict, and the equities between them evenly balanced, the latter are, to say the least, of equal dignity and respect. The state has a deep interest in seeing that families are not left in a destitute condition upon the death of the husband and father, and in having children properly educated and fitted to become respectable and self-supporting citizens. When, therefore, a husband takes out a policy of insurance for the benefit of his wife and family, such a provision is regarded as being of the most meritorious character, and the law universally recognizes that in so doing he has performed a social and moral duty. Goodrich v. Treat, 3 Colo. 408; Bank v. Hume, 3 Mackey, 360. Indeed, it may be said in this state that he has fulfilled, in principle at least, a legal obligation. Here the head of a family may be compelled to support his wife and children, and, upon failure, may be punished by imprisonment; and this, too, independent of any considerations of his indebtedness. The duty which he owes to his dependent family and to the state is of higher importance than that which he owes to his individual creditors. This may almost be said to be a legislative recognition of the public policy to which we have referred. We see no difference in principle between compelling the husband, while living, to support his wife and family, and in permitting him to make some provision for their support, to at least a reasonable extent, after his death.

But, say counsel, admitting that she was preferred as a creditor, she would equitably be entitled only to so much of the insurance fund as would discharge her debt and interest thereon, and the balance realized from the insurance should be accounted for by her to the estate of the decedent, and become charged with the payment of his other debts. Without entering into discussion as to whether this is in all cases the true rule for the disposition of insurance proceeds where the life of a debtor has been insured for the benefit of a creditor, we say that the rule is not applicable to the facts of this case, nor, indeed, as broadly stated, to the facts of any case where the creditor was also the wife or a member of the assured's family, whom he was legally and morally bound to support. In such case, it will be assumed, unless there be some evidence to the contrary, that the insurance was carried for the double purpose of paying the debt, and also to provide a fund for the support of the beneficiary. An ordinary creditor is enabled to insure his debtor's life by virtue of his debt only. It might then with much reason be claimed that his insurable interest is limited to the amount of the debt and a reasonable amount added for the expenses of procuring and carrying the insurance. It could be urged with great force that to hold otherwise would, in effect, make the contract of insurance a wagering contract. This reason does not prevail, however, where the creditor is also the wife of the assured, or a dependent member of his family. The insurable interest of such a person is not limited to any fixed amount. Insurance in such case may be procurred to any amount to which the companies may be willing to contract, and, however large it may be, it cannot be called a wagering contract. The law does not undertake to fix the amount beyond which a man shall not go in making provision for his dependent family. The reason of the rule, therefore, conceding it to be as contended for by plaintiff, fails when applied to such insurance as that here in question, and hence the rule falls with it. If any of the policies were, by their terms, made payable to defendant as a creditor, the contention of plaintiff as to the disposition of the proceeds of such might have some apparent force. This was not the case, however, with any one of them. It was

specifically provided in all that they inured to the benefit of defendant, as the wife of the assured. Even, however, if the rule were applicable to this case, it would avail the plaintiff nothing, because all of the insurance purchased by the premiums paid during the years 1893 and 1894, conceding that the assured was then insolvent, would not have been more than sufficient to have discharged the actual indebtedness to defendant, as claimed by her.

It is insisted, however, by plaintiff, that the amount of insurance carried by the deceased in favor of defendant was so large as to be unreasonable, and to raise a presumption of fraud, whether viewed in the aspect of insurance carried for the benefit of a creditor, or of his wife and family, or of both, and that it would be inequitable for her to retain all of the proceeds. We do not think so. The policies on which were realized three-fourths of the whole amount received by defendant were taken out, and the title thereto had become vested in her, long prior to any pretense of Col. Platt's insolvency, and prior to any indebtedness by him to this plaintiff, and, as to these, it does not concern plaintiff whether the amount was large or small. If it had been three times as large as it was, we cannot see upon what principle a creditor, especially a subsequent creditor, could complain. Neither, in the view which we take of this case, will it avail plaintiff to make inquiry into the reasonableness of the amount of insurance secured by premiums paid by the assured during the two years of his alleged insolvency. He was indebted to defendant in a sum greater than the aggregate of the premiums so paid; and the presumption being, as we have held, that, in making such payments, he was preferring her as a creditor to that extent, she was entitled, by virtue of her insurable interest in his life as his wife, to all of the insurance, whether great or small, that the sums advanced to her or for her benefit as a preferred creditor would buy. It was, in effect, her money that bought the insurance.

Even if we consider the whole amount realized, it is not sufficient, in our opinion, to raise any presumption of fraudulent intent or constructive fraud, when we look at the facts of this case and the character of the insurance. Of the $100,000

realized, $40,000 was from accident insurance. This is the simplest form of insurance, and the principles which control and apply to it are quite different from those controlling and applying to life insurance. The latter is based upon the assured's expectancy of life, calculated upon his age, physical condition, etc., and matures upon the happening of an event which is certain, namely, the ultimate death of the assured. In the former class of insurance, the expectancy of life is not a controlling factor, nor is the age or physical condition of the assured. Primarily, it is intended to indemnify the assured personally against loss of time, medical attendance, etc., in case of suffering accidental physical injuries, which incapacitate him from attending to his business. In this respect it may be said to be in the interest of his creditors, because, if disabled from carrying on his business, his earning capacity is at least lost for a time, and his expenses, while so disabled, must, of necessity, come from his estate. Such a policy fully matures only upon the happening of an event which may never take place, namely, the death from accidental causes of the assured. In fact, the presumption is that the event will not occur. The percentage of chances against it is very great; otherwise, companies could not furnish such insurance at the cheap rate they do. We are not prepared to say, therefore, that when a man, in the exercise of provident care, sees fit to carry, in addition to life insurance, accident insurance to an amount, as in this case, of $40,000, such an increased amount, even if by accident it should fully mature, renders the insurance carried unreasonable and excessive, and constructively a fraud upon the creditors; much less so when it appears that the annual premiums for the whole of the accident insurance did not exceed about $160. The assured was engaged in carrying on very extensive business operations, and his time was valuable. In case of accidental disability, his total weekly benefits would not have exceeded $200; and this was not unreasonable when the indemnity could be secured at the expenditure of such a small amount of money.

The last contention of plaintiff is that, in any event, the two policies issued by the New York Life Insurance Company were fraudulent and void as to the creditors of the assured,

and were to be subjected to the payment of his debts, because of certain provisions in the policies. The $15,000 policy provided among its conditions that if the assured was living at the expiration of 20 years from the date of its issuance, at which date the accumulation period of the policy was to end, he should have the privilege of continuing the policy and receiving the value of the dividends in one of certain forms specified, or to exchange the policy for its entire value, it being guarantied that this entire value should be, in case the assured elected to receive it in a single cash payment, not less than $6,311,—a sum which, as will be seen, is less than one-half of the sum which would have been paid in case of his death at any time. The assured also had an option, at the expiration of this 20-year period, to exchange the policy for a paid-up policy, payable after death, in 20 equal installments. The $25,000 policy recited that it was issued on the distribution policy plan, the particulars of which, so far as material to notice, are that the distribution period should be completed in 20 years, and that no dividend or surplus would be allowed or paid upon the policy unless the assured should survive the completion of this distribution period. If he did so survive such period, he would be entitled to apply the accumulated surplus apportioned to this policy to the purchase of an annuity on his life, or to continue the policy for the original amount, and withdraw in cash the accumulated surplus apportioned to it, or to withdraw in cash the entire equity,—that is, the net reserve, which was stipulated to be $9,820 (a little more than one-third of the amount payable in case of death), and, in addition thereto, the accumulated surplus,—or to convert the entire equity into a paid-up policy. There are some material differences between the conditions of these policies and endowment policies, as the latter are defined by the authorities; and these distinguishing features have an important bearing upon the doctrine laid down in the cases to which we have been cited by plaintiff in support of its position that these policies were fraudulent as to the creditors of the assured. In the view which we take of the case, however, it is not necessary for us to discuss these differences. If the doctrine which we have heretofore announced in this

case is correct, then the contention of plaintiff as to these policies is equally untenable. In no event, it may be said at the outset, could the plaintiff claim a right against any part of the proceeds arising from the $25,000 policy, unless it be the amount of the premiums paid during the years 1893 and 1894, because it was taken out and premiums paid for a number of years prior to the time when there is any pretense of the insolvency of the assured, and because it matured long prior to the expiration of the 20-year period. However this may be, in both cases the title to the policies vested in the beneficiary, Mrs. Platt, so soon as they were issued, subject only to certain conditions which might devest her of that title after the expiration of 20 years. Until that period expired, her title was as absolute as if the insurance had been upon any other plan, and as if none of these conditions had been inserted. If the assured had survived the 20-year period, the contention of plaintiff might have been urged with some force. As in other forms of insurance, the subject of this was the insurable interest of the wife in the life of her husband, the assured, for 20 years at least; and life insurance becomes none the less life insurance because it is taken for only a term of years, instead of for the duration of life. These views are sustained, we think, upon principle, and by the doctrines announced in Insurance Co. v. Woods; 11 Ind. App. 335, 37 N. E. 180, and 39 N. E. 205; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205; Briggs B. McCullough, 36 Cal. 542; Bliss, Ins. No. 6; and Forrester v. Gill, 11 Colo. App. —, 53 Pac. 230. However this may be, the money which the assured was owing to Mrs. Platt was far more than sufficient to pay all of the premiums upon these policies; and, as we have before said, as between the parties it will be presumed, that he intended to prefer her as a creditor. This, therefore, was not a locking up of the funds of the debtor, so as to place them beyond the reach of his creditors, which was the main reason urged in the cases to which we have been cited as to the fraudulent character of the endowment policy. It was giving the money to a creditor, as he had a right to do.

We are fully aware that the questions which we have decided are debatable, and for this reason we have given to them most

earnest and thorough investigation. We fail to find any adjudications directly in point; but we believe that our conclusions are in accord with the principles laid down in the later cases of highest authority, with the spirit of the law, with public policy and especially with the policy of the law in Colorado. It is true that Bank v. Hume, supra, is not an authority binding absolutely upon the courts of this state; but upon questions like these, which are not settled in this state either by statute or by prior adjudications, it is certainly very high authority, and we should hesitate before we refused to follow it, especially when, as in the present instance, the opinion was rendered by a unanimous court, and the doctrines enunciated are in accord with our own views. For the reasons given, the judgment will be affirmed. Affirmed.

Accord. First Nat. Bank v. Simpson, 152 Mo. 638, 54 S. W. 506.

Note. The proceeds of a life insurance policy while in the hands of the insurer, payable to the wife of decedent, in the absence of statute, are subject to attachment in a suit by her creditors. Amberg v. Manhattan Life Ins. Co., 65 N. Y. S. 424, Reversed, 171 N. Y. 314, 63 N. E. 1111. The policy was payable to insured's parents. *Held* the policy was in the nature of a gift to the parents and was therefore subject to the debts of the insured. Lehman v. Gunn, 124 All 213, 51 L. R. A. 112, 27 So. 475.

HAVEN v. HOME INS. CO. et al.

Springfield Court of Appeals. Missouri. July 7, 1910. 130 S. W. 23.

Change of Beneficiary—What Law Governs.

Cox, J. On August 24, 1903, the defendant insurance company issued to the plaintiff a policy of insurance No. 119,387, whereby it agreed to pay $5,000 to Pearl L. Haven, the wife of plaintiff, if she survive her husband, the insured; otherwise, the insured, his executors, administrators, or

assigns, was the payee. This was a 20-year tontine policy; the annual premium being $194.75. The plaintiff lived at Carthage, Jasper county, at the time, and the policy was delivered to him there. On March 4, 1908, Pearl L. Haven was granted a divorce from the plaintiff by the circuit court of Jasper county for the fault of plaintiff. There was at the time living children born of this marriage, to wit, Ina, Edna, Mary, Helen, and Frank Haven. On December 21, 1908, plaintiff applied to defendant Home Insurance Company to have the name of the beneficiary in the policy changed from Pearl L. Haven to his five children aforesaid. The insurance company refused to make the change without the consent of Pearl L. Haven. Thereupon plaintiff brought this suit in equity asking to force the change to be made alleging the facts as above set out. Defendant Pearl L. Haven answered admitting the granting of the divorce, and alleging that it was for the fault of her husband, and asserting that she had an interest in the policy and was unwilling to consent to the change. The insurance company answered alleging that the beneficiary named in the policy had refused to consent to the change, and that the policy provided that it should be construed under the laws of the state of New York, and that state did not permit the change in the name of the beneficiary to be made without the consent of said beneficiary. Plaintiff replied with a general denial. Upon the trial the policy was offered in evidence by the plaintiff; also, the application of plaintiff to have the name of the beneficiary changed and designating his children as the ones he desired to be substituted for Pearl L. Haven, the one named in the policy. Plaintiff also testified that he had paid all the premiums from the time the policy was first issued. No evidence was offered on the part of defendant. The court upon these facts dismissed plaintiff's bill, and plaintiff has appealed.

No evidence was offered as to what the provisions of the law of New York are in relation to this question, and, if it had been shown that they were different from our statute, yet under the evidence in this case, this was Missouri business by a foreign insurance company, and hence

this policy would have to be construed according to the Missouri law. Moore v. Insurance Co., 112 Mo. App. 696, 702, 87 S. W. 988; Cravens v. Insurance Company, 148 Mo. 583, 601, 50 S. W. 519, 53 L. R. A. 305, 71 Am. St. Rep. 628.

The contention in this case rests upon the construction to be given section 7895, Rev. St. 1899 (Ann. St. 1906, p. 3749), which is as follows: "Policy for benefit of married women.—Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of the wife of the insured, shall inure to her separate benefit, independently of the creditors, executors, and administrators of the husband; provided, however, that in the event of the death or divorcement of the wife before the decease of the husband, he shall have the right to designate another beneficiary, upon written notice to the company, but such notice shall not be effective, unless indorsed upon the policy by the president or vice president and secretary of the company issuing the policy. But when the premiums paid in any year out of the funds or property of the husband shall exceed the sum of five hundred dollars, such exemptions from such claims shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess shall inure to the benefit of his creditors."

Appellant contends that under this statute and the terms of this policy he has the right to designate another beneficiary upon the granting of the divorce to his wife. While respondent contends that this statute does not apply in this case for two reasons: First, that the divorce in this case was granted for the fault of the husband, and to permit plaintiff after the divorce has been granted to designate another beneficiary and destroy the wife's interest in the policy would be to permit him to take advantage of his own wrong; second, because this policy provides that upon the death of the beneficiary prior to the death of the plaintiff the policy would then be payable to the insured's executors, administrators, or assigns, and hence

there is another party interested as beneficiary in the policy other than the wife, and for that reason this section of the statute does not apply.

The construction of this statute was before the Supreme Court of this state in the case of Blum v. New York Life Insurance Co., 197 Mo. 513, 95 S. W. 317, 8 L. R. A. (N. S.) 923, and the same point was made in that case that is made in this; but the court held in that case that it was unnecessary for them to pass upon that question and expressly refused to do so, and hence we are left without any precedent in that court upon which to determine the question involved in this case. It was there held that a policy issued prior to the enactment of section 7895 was not affected by that section. The policy in question in this case was issued since the enactment of that section. Hence it comes squarely under its provisions, and the provisions of that section are to be read into this policy, and its terms are to be construed in the light of the fact that the parties to the contract of insurance knew of its provisions at the time the contract was executed. Reed v. Painter, 129 Mo. 674, 680, 31 S. W. 919; State v. Berning, 74 Mo. 87, 96; Isenhour v. Barton Co., 190 Mo. 163, 173, 88 S. W. 759.

The position of respondent that a policy which confers an interest upon some person other than the named beneficiary or the plaintiff does not come under this statute is correct, and it has been expressly so held. Blum v. N. Y. Life Insurance Co., supra. But as we view it the provision in this policy that in case the beneficiary should die before the insured the policy should then be payable to the insured's estate does not bring this policy within the rule above announced, for it would seem to be too clear for argument that, if the only beneficiary in this policy had been the executors or administrators of the plaintiff, he could have changed the beneficiary at will.

We come now to the construction of section 7895, and that portion of it which is called in question here reads as follows: "Provided, however, that in the event of the death or divorcement of the wife before the decease of the husband he shall have the right to designate another

beneficiary upon written notice to the company," etc. The question to be determined is whether this provision applies in all cases of divorce between husband and wife, or whether it is to be limited to those cases in which the divorce shall be granted for the fault of the wife. In construing statutes there are two things that must be constantly borne in mind. One is that the words used are to be construed according to their ordinary meaning. Another is that the purpose to be attained by the statute or the mischief to be prevented should be kept in mind in determining what the Legislature meant by the enactment of the statute.

The question here turns upon the meaning of the word "divorcement." The word is defined by Webster to mean "dissolution of the marriage tie; divorce; separation." "Divorce" is defined by the same author: "A legal dissolution of the marriage contract by a court or other body having competent authority." The word "divorce" is also defined by Bouvier to mean a dissolution or partial suspension by law of the marriage relation, and we think that in common legal parlance the term "divorce" is used indiscriminately to express a legal dissolution of the marriage relation without any distinction as to who was in fault in bringing about the dissolution, and our conclusion is that the ordinary meaning of the word "divorcement" is practically the same as "divorce" and simply means a legal dissolution of the marriage contract and is not restricted to one party or the other; so that, unless the policy of the law and the purpose to be obtained in the enactment of this statute requires a restriction, or a different construction to be put upon this language, the contention of appellant must be upheld in this case.

While the contract of marriage is often denominated a civil contract, and it is universally held to be a civil contract, yet it is more than a civil contract. The public is also to a limited extent a party to all marriage contracts, and especially is the public interested in the dissolution of marriage contracts, and hence the parties to it cannot dissolve it at will, but it can only be dissolved in

the manner provided by law. Hence we take it that the general policy of the law as applied to the marriage relation and its dissolution should be taken into consideration in interpreting all statutes relating thereto.

The statute in controversy taken as a whole is in the nature of a statute of exemption and is intended to clothe the husband with the power to provide for his wife in a way that cannot be interfered with by his creditors. This purpose is made clear by the latter provision of this section in which it is provided: "But when the preuiums paid in any year out of the funds or property of the husband shall exceed the sum of five hundred dollars, such exemption from such claims shall not apply to so much of said premiums so paid as shall be in excess of five hundred dollars, but such excess shall inure to the benefit of his creditors." This statute, then, being in the nature of an exemption statute, must receive a liberal construction so as to effectuate its purpose and spirit. Wanschaff v. Masonic Mutual Benefit Association, 41 Mo. App. 206, 211; Casebolt v. Donaldson, 67 Mo. 308.

When we revert to the purpose of the husband in taking out this policy, it is clear that his desire to provide for his wife after his death was uppermost in his mind at the time the policy was secured, and it is also clear that at that time no thought entered his mind of a possibility of a separation between him and his wife; but he evidently secured the policy and paid the premiums for the purpose of providing for his wife only upon condition that she should remain his wife up to the time of his death. If we are to hold that this statute is to be limited to those cases only in which the divorce shall be granted for the fault of the wife, then, after divorce we are attempting to force the husband to continue to provide for his divorced wife even though he be under no legal obligation to support her and in the face of the fact that there would be no moral obligation upon him to support her, and further that the conditions would be such that in all probability he would absolutely refuse to do so.

It is contended by respondent that the wife, Pearl L.

Haven, had a vested interest in this policy from the date of its issue, and that neither the husband nor the insurance company can deprive her of that right. This has been held to be the law; but it has arisen in cases involving the right to collect the policy after the death of the insured, and in those cases it has been held that the interest of the wife did become vested at the date of the issuance of the policy, and that the subsequent acts of the husband and the insurance company did not deprive her or her heirs of the right to collect the policy if it were kept alive until the death of the insured. U. S. Casualty Company v. Kacer, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641; Blum v. N. Y. Life Insurance Company, 197 Mo. 513, 95 S. W. 317, 8 L. R. A. (N. S.) 923; Diohm v. Insurance Co., 129 Mo. App. 256, 108 S. W. 139. While the law remained in that condition, the divorce of the wife even for her fault would not deprive her of her vested interest in the policy.

The Legislature is presumed to have been familiar with the condition of the law at the time they enacted the statute in question. It is to be presumed that they knew at that time that the death of the wife, in the absence of an express provision in the policy, would not deprive her estate of her interest in the policy. Keeping this in view, and also the fact that this statute is in the nature of a statute of exemption, and that the purpose to be carried out by the change in the statute was to place it within the power of the husband securing the issuance of the policy to provide after his death for those dependent upon him for support, we think the interests of a sound public policy will be subserved by giving to the words of this statute their ordinary meaning and making this provision apply to all cases in which the husband and wife may become divorced without any reference to whose fault brought about the separation and the divorce. A different construction would be to compel the husband, as he had a right to do under the terms of this policy, to surrender it and take up its cash value, or to induce him to refuse to pay the premiums, which would result in the policy lapsing, or, at least, becoming very much

deteriorated by reducing the amount of paid-up insurance which, under the laws of this state, would accrue to the beneficiary in the policy by reason of the fact that the required number of premiums had been paid to bring those provisions of the law into operation.

Our conclusion is that the purpose underlying this statute is to vouchsafe to the husband, without regard to who was in fault in the divorce proceedings, the same freedom of action in providing for those whom he might be under some moral obligation to provide for after his death that he would have had if the marriage relation had never existed between him and the defendant Pearl L. Haven. The purpose underlying all contracts of life insurance, where the policy is secured and the premiums paid by the insured, is to provide for those dependent upon him after his death, and, when the divorce between him and his wife was granted, he would no longer feel the obligation to provide for her resting upon him, and for this reason we think the intention of the Legislature was to leave him unhampered when in that condition to provide another beneficiary for whose benefit he would be willing to continue the payment of the premiums and thus keep the policy alive.

Under the facts in this case which are not disputed and in which it appears that the plaintiff had paid all the premiums, our conclusion is that the court was in error in dismissing the plaintiff's bill.

The judgment will be reversed, and the cause remanded, with directions to enter a decree for plaintiff as prayed.

Note. The above decision was predicated on the statute of Mo. The rule is that where the policy does not give the assured the right to change the beneficiary, that no change can be made without the consent of the beneficiary. In other words the beneficiary has a vested right in the policy from the time the insurance is in force. Franklin Life Ins. Co. v. Galligan, 71 Ark. 295, 100 Am. St. Rep. 73; Kline v. Nat. Ben. Ass'n, 111 Ill. 462, 11 N. E. 620; Mut. Ben. Life Ins. Co. v. Dunn, 106 Ky. 509; Laughlin v. Norcross, 97 Me. 33; Lockwood v. Michigan Mut. Life Ins. Co., 108 Mich. 334, 66 N. W. 229.

DALBY v. INDIA AND LONDON LIFE ASSURANCE CO.

Exchequer Chamber, 1854. 15 C. B. 365.

Reinsurance.

This was an action on a policy effected by the plaintiff on January 9, 1847, for and on behalf of the directors of the Anchor Life Assurance Co., in the sum of £1,000, on the life of the Duke of Cambridge, for the whole term of his life.

The pleadings and the facts are abstracted in the opinion of the court.

The cause came on for trial before Creswell, J., when, a point being reserved for the opinion of the Court of Common Pleas involving a question as to the propriety of the decision in Godsall v. Boldero, 9 East, 72, it was, at the suggestion of that court, agreed that the facts should be stated for the opinion of the Court of Error in the shape of a bill of exceptions.

According to the bill of exceptions, the judge directed the jury that there was no evidence that the Anchor Life Assurance Company was interested in the life of the Duke of Cambridge, in manner and form as the declaration had alleged; and thereupon the jury gave their verdict for the defendants; but the counsel for the plaintiff, before verdict, excepted to the direction.

Parke, B., now delivered the judgment of the court * * *

It is an action on what is usually termed a policy of life assurance, brought by the plaintiff as a trustee for the Anchor Assurance Company, on a policy for £1,000 on the life of his late Royal Highness the Duke of Cambridge.

The Anchor Life Assurance Company had insured the Duke's life in four separate policies,—two for £1,000, and two for £500 each, granted by that company to one Wright. In consequence of a resolution of their directors, they determined to limit their insurances to £2,000 on one life; and, this insurance exceeding it, they effected a policy with the defendants for £1,000 by way of counter-insurance.

At the time this policy was subscribed by the defendants, the Anchor Company had unquestionably an insurable interest to the full amount. Afterwards, an arrangement was made between the office and Wright for the former to grant an annuity to Wright and his wife, in consideration of a sum of money, and of the delivery up of the four policies to be cancelled, which was done; but one of the directors kept the present policy on foot, by the payment of the premiums till the Duke's death.

It may be conceded, for the purpose of the present argument, that these transactions between Wright and the office totally put an end to that interest which the Anchor Company had when the policy was effected, and in respect of which it was effected; and that at the time of the Duke's death, and up to the commencement of the suit, the plaintiff had no interest whatever.

This raises the very important question, whether, under these circumstances, the assurance was void, and nothing could be recovered thereon.

If the court had thought some interest at the time of the Duke's death was necessary to make the policy valid, the facts attending the keeping up of the policy would have undergone further discussion.

There is the usual averment in the declaration, that, at the time of the making of the policy, and thence until the death of the Duke the Anchor Assurance Company was interested in the life of the Duke, and a plea that they were not interested modo et forma,—which traverse makes it unnecessary to prove more than the interest at the time of making the policy, if that interest was sufficient to make it valid in point of law. Lush v. Russell, 5 Exch. 203. We are all of opinion that it was sufficient; and, but for the case of Godsall v. Boldero, 9 East, 72, should have felt no doubt upon the question.

The contract commonly called life assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,—the amount of the annuity being calculated, in the first instance, ac-

cording to the probable duration of the life; and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity.

Policies of assurance against fire and against marine risks, are both properly contracts of indemnity,—the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships, and effects. Policies on maritime risks were afterwards used improperly, and made mere wager on the happening of those perils. This practice was limited by the 19 Geo. II., c. 37, and put an end to in all except a few cases. But, at common law, before this statute with respect to maritime risks, and the 14 Geo. III., c. 48, as to insurances on lives, it is perfectly clear that all contracts for wager policies, and wagers which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court in Cousins v. Nantes, 3 Taunt. 315, to have been solemnly determined in the case of Lucena v. Craufurd, 2 Bos. & P. 324; 2 N. R. 269, without even a difference of opinion among all the judges. To the life effect was the decision of the Court of Error in Ireland, before all the judges except three, in The British Insurance Company v. Magee, Cooke & Alcock, 182, that the insurance was legal at common law.

The contract, therefore, in this case, to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge, would have been unquestionably legal at common law, if the plaintiff had had an interest thereon or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 Geo. III., c. 48. This depends upon its true construction.

The statute recites that the making insurances on lives and other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming; and, for the remedy thereof, it enacts "that no insurance shall be

made by any one on the life or lives of any person or persons, or on any other events whatsoever, wherein the person or persons for whose use and benefit, or on whose account, such policy shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever."

As the Anchor Assurance Company had unquestionably an interest in the continuance of the life of the Duke of Cambridge—and that to the amount of £1,000, because they had bound themselves to pay a sum of £1,000 to Mr. Wright on that event—the policy effected by them with the defendants was certainly legal and valid, and the plaintiff without the slightest doubt, could have recovered the full amount, if there were no other provisions in the act.

This contract is good at common law, and certainly not avoided by the first section of the 14 Geo. III. c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided. * * * Judgment reversed and venire de novo.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, Plff. in Err., v. FRANCISCA SCHAEFER.

94 U. S. 457.

Joint Policy, Husband and Wife, Divorce.

Mr. Justice Bradley delivered the opinion of the court:

This was an action on a policy of life assurance issued July 25, 1868, on the joint lives of George F. and Francisca Schaefer, then husband and wife, payable to the survivor on the death of either. In January, 1870, they were divorced, and alimony was decreed and paid to the wife, and

there was never any issue of the marriage. They both subsequently married again, after which, in February, 1871, George F. Schaefer died. This action was brought by Francisca, the survivor.

On the trial of the cause, several exceptions were taken by the defendant, the Insurance Company, to the rulings and charge of the court, and this writ of error is brought to reverse the judgment for alleged error in said rulings and charge.

The first exception was for overruling certain testimony offered herself as a witness, on her cross-examination admitted that she had employed one Harris as her attorney to file her petition for divorce; and being questioned whether she had not stated to him, to be embodied in the petition, that Schaefer had been a habitual drunkard for a period of more than thee years prior to the date of filing the petition, denied that she had so stated to him. (Had such been the fact, it would have falsified the statement made in the application for insurance.) The defendant called Harris, and asked him whether the plaintiff had not so stated to him on that occasion. The question was objected to and overruled, as calling for confidential communications between attorney and client. The defendant alleges that herein the court erred, because, by the law of Ohio, such communications are not privileged. An examination of the Ohio statutes renders it doubtful whether the law is as the defendant contends. But if it were, the court did right to exclude the testimony. The laws of the State are only to be regarded as rules of decision in the courts of the United States where the Constitution, treaties, or statutes of the United States have not otherwise provided. When the latter speak, they are controlling; that is to say, on all subjects on which it is competent for them to speak. There can be no doubt that it is competent for Congress to declare the rules of evidence which shall prevail in the courts of the United States, not affecting rights of property; and where Congress has declared the rule, the state law is silent. Now, the competency of parties as witnesses in the Federal Courts depends on the

Act of Congress in that behalf, passed in 1864, 13 Stat. at L., 351, amended in 1865, 13 Stat. at L., 533, and codified in the Revised Statutes section 858. It is not derived from the Statute of Ohio; and is not subject to the conditions and qualifications imposed thereby. The only conditions and qualifications which Congress deemed necessary are expressed in the Act of Congress; and the admission in evidence of previous communications to counsel is not one of them, and it is to be hoped that it will not soon be made such. The protection of confidential communications made to professional advisers is dictated by a wise and liberal policy. If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. It would be a prohibition upon professional advice and assistance.

The other exceptions were to the charge of the court, and relate to two points; first, to the forbearance note given for a portion of the last renewal premium; and, second, to the alleged failure of interest of the plaintiff in the policy, caused by the divorce of the insured parties.

First, as to the forbearance note. Only one-half of the annual premium was required to be paid in cash; the insured, if they chose, could have a credit for the other half. This credit was given upon the assured's signing an acknowledgment in the following form: "I hereby acknowledge a credit or forbearance of ——— dollars of the premium on my policy No. ———, which amount shall be a lien on said policy at six per cent per annum until paid or adjusted by return of surplus premium." It was not a note promising to pay money, but a form of acknowledgment by which the assured consented to a deduction from the policy for non-payment of a portion of the premium. As long as George F. Schaefer took any interest in the policy, he signed this acknowledgment for himself and wife, "George F. and Franc. Schaefer;" or for himself alone. One premium became due after the divorce, and Francisa Schaefer herself attended to the payment of

it, paying the cash portion, and authorizing her son to sign the forbearance note, as it is called. He did so in the name of both parties insured, thus: "Geo. F. and F. Schaefer." The company accepted it. On what valid ground they can now object to the transaction, it is difficult to see. A joint act was to be done. Only one of the parties could physically do it. Either had a right to do it. This act was, to pay or settle the annual premium. The plaintiff, as one of the joint parties, performed what was necessary to be done. George F. Schaefer could not complain, for it was done in his interest, keeping the policy alive for his benefit as well as Francisca's. The Company could not complain; for they accepted both the money and the acknowledgment in the form in which they were given. There is no pretense that any deception was practiced upon them.

This point is really frivolous.

The other point, relating to the alleged cessation of insurable interest by reason of the divorce of the parties, is entitled to more serious consideration, although we have very little difficulty in disposing of it.

It will be proper, in the first place, to ascertain what is an insurable interest. It is generally agreed that mere wager policies, that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction, are void, as against public policy. This was the law of England prior to the Revolution of 1688. But after that period, a course of decisions grew up sustaining wager policies. The Legislature finally interposed, and prohibited such insurance; first, with regard to marine risks, by Statute of 19 Geo. II., ch. 37; and next, with regard to lives, by the statute of 14 Geo. III., ch. 48. In this country statutes to the same effect have been passed in some of the States; but where they have not been, in most cases either the English statutes have been considered as operative, or the older common law have been followed. But precisely what interest is necessary; in order to take a policy out of the category of mere wager, has been the subject of much discussion. In

marine and fire insurance the difficulty is not so great, because there insurance is considered as strictly an indemnity. But in life insurance the loss can seldom be measured by pecuniary values. Still, an interest of some sort in the insured life must exist. A man cannot take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him.

It is well settled that a man has an insurable interest in his own life and in that of his wife and children; a woman in the life of her husband; and the creditor in the life of his debtor. Indeed it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend; or two or more persons, on their joint lives, for the benefit of the survivor or survivors. The old tontines were based substantially on this principle, and their validity has never been called in question.

The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. On this point, the remarks of Chief Justice Shaw, in a case which arose in Connecticut (in which State the present policy originated), seem to us characterized by great good sense. He says:

"In discussing the question in this Commonwealth (Massachusetts), we are to consider it solely as a question of common law, unaffected by the Statute of 14 Geo. III., passed about the time of the commencement of the revolution, and never adopted in this State. All, therefore, which it seems necessary to show, in order to take the case out of the objection of being a wager policy, is, that the insured has some interest in the cestui que vie; that his temporal affairs, his just hopes and well grounded expectations of support, of patronage and advantage in life, will be impaired; so that the real purpose is not a wager, but

to secure such advantages, supposed to depend on the life of another; such, we suppose, would be sufficient to prevent it from being regarded as a mere wager. Whatever may be the nature of such interest, and whatever the amount insured, it can work no injury to the insurers, because the premium is proportioned to the amount; and whether the insurance be a large or small amount, the premium is computed to be a precise equivalent for the risk taken. We cannot doubt," he continues, "that a parent has an interest in the life of a child, and vice versa, a child in the life of a parent; not merely on the ground of a provision of law that the parents and grandparents are bound to support their lineal kindred when they may stand in need of relief, but upon considerations of strong morals, and the force of natural affection between near kindred operating often more efficaciously than those of positive law." Loomis v. Ins. Co., 6 Gray, 399.

We concur in these views, and deem it unnecessary to cite further authorities, all those of importance being collected and arranged in the recent treatises on the subject. See, May, Ins., secs. 102-111; Bliss, L. Ins., secs. 20-31.

The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, that a policy taken out in good faith and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself. Of course, a colorable or merely temporary interest would present circumstances to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is suffi-

ciently attained; and there is then no good reason why the contract should not be carried out according to its terms. This is more manifest where the consideration is liquidated by a single premium paid in advance, than where it is distributed in annual payments during the insured life. But in any case it would be very difficult, after the policy had continued for any considerable time, for the courts, without the aid of legislation, to attempt an adjustment of equities arising from a cessation of interest in the insured life. A right to receive the equitable value of the policy would probably come as near to a proper adjustment as any that could be devised. But if the parties themselves do not provide for the contingency, the courts cannot do it for them.

In England, by the operation of the Statute of 14 Geo. III., as construed by the courts, the law has assumed a very definite form. In a lucid judgment delivered by Baron Parke in the Exchequer Chamber, in the case of Dalby v. Ins. Co., decided in 1854, 15 C. B., 365, it was held that the true meaning of the statute is, that there must be an interest at the time the insurance is effected, but that it need not continue until death, the words of the statute being: "That no insurance shall be made on a life or lives, wherein the assured shall have no interest, or by way of gaining or wagering," and "that in all cases where the insured hath interest in such life, etc., no greater sum shall be recovered than the amount or value of the interest." The word "hath" was construed as necessarily referring to the time of effecting the insurance and not to the time of the death; that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain, and preserve a fixed relation between the premiums and the amounts insured, as required by the principles of life assurance. This case overruled the previous case of Godsall v. Boldero, 9 East, 72, decided by Lord Ellenborough, in which, proceeding upon the idea that life insurance is a mere contract of indemnity, it was held that the interest must continue until death, and even until the bringing of the ac-

tion. Baron Parke, in commenting upon this case, very justly says:

"Upon considering this case, it is certain that Lord Ellenborough decided it upon the assumption that a life policy was in its nature a mere contract of indemnity, as policies on marine risks and against fire undoubtedly are; and that the action was, in point of law, founded on the supposed damnification, occasioned by the death of the debtor, existing at the time of the action brought; and his Lordship relied upon the decision of Lord Mansfield in Hamilton v. Mendes, 2 Burr., 1198, that the plaintiff's demand was for an indemnity only. Lord Mansfield was speaking of a policy against marine risks, which is, in its terms, a contract for indemnity only. But that is not the nature of what is termed an assurance for life; it really is what it is on the face of it, a contract to pay a certain sum in the event of death. It is valid at common law; and, if it is made by a person having an interest in the duration of the life, it is not prohibited by the statute."

As thus interpreted, we might almost regard the English statute as declaratory of the original common law, and as indicating the proper rule to be observed in this country where that law furnishes the only rule of decision.

Be this, however, as it may, in our judgment a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured.

The judgment of the Circuit Court is affirmed.

CHAPTER VII.

LIFE INSURANCE BENEFICIARY SOCIETIES.

BUCHANAN v. SUPREME CONCLAVE IMPROVED ORDER OF HEPTASOPHS.

Supreme Court of Pennsylvania. Nov. 11, 1896. 178 Pa. St. 465.

Nonpayment of Assessments—Rights of Beneficiary.

The trial court (Slagle, J.) rendered the following opinion on refusing a motion for a new trial: "This was an action upon a benefit certificate issued to D. H. Buchanan, and made payable to the plaintiff, his daughter. A verdict was rendered in favor of plaintiff. A motion for a new trial was made by defendant, for which a number of reasons have been assigned. We think there was sufficient evidence for submission to the jury of the questions of fact, and only two of the reasons assigned need to be considered. The fourth assignment is as follows: 'Witnessess for plaintiff having testified that D. H. Buchanan did not, to their knowledge, receive his copy of the Advocate in September, 1894, the court erred in charging the jury that mailing the said Advocate at Baltimore to the proper address of D. H. Buchanan was prima facie evidence that he received it, but that that evidence might be rebutted.' The court did not instruct the jury as stated. It was contended by plaintiff that the notice published in the Advocate was not the notice required by the constitution of the order; that it was a notice addressed to the conclaves, and should have been addressed to the members. The court held that the notice was sufficient in form. It was further contended that there was not sufficient evidence of mailing. The court submitted the question to the jury as follows: 'Now, was this placed in the post office, properly addressed to Mr. Buchanan at the place of his residence, of which the order had notice upon their records. If so, then notice was given.' Counsel for plaintiff contended that they might show that it had not been received. It would probably have been better to

have said that it was immaterial whether it had been received or not, the court having practically instructed the jury that there was no evidence to rebut the presumption that it had been received, and may have fallen into an error in saying, 'However, if under all the evidence in the case, you are not satisfied that this notice was not properly sent and received, the defendant has not made out a case of suspension.' But this certainly could have done no harm, as the case was submitted to the jury on the question which is the subject of the fifth assignment, as follows: 'The court erred in its charge to the jury in stating that Mabel Buchanan, the plaintiff, had an interest in the benefit certificate sued on, and that she was entitled to notice of the calling of assessments, for the nonpayment of which D. H. Buchanan was suspended, if said D. H. Buchanan was mentally incapable of receiving or of understanding the meaning or effect of said notice, there being no provision in the law of the defendant entitling the plaintiff to any such notice in this case.' This is not in the language of the court, but is substantially correct. There was some evidence of the incapacity of Mr. Buchanan at and before the assessment of September, 1894, was made, and that it continued until his death. It was also in evidence that before the assessment was made Mabel Buchanan, the beneficiary, had written to the financial officer to whom all assessments were payable, referring to her father's condition, stating that he was careless, and liable to neglect them [the assessments]; that she had at various times paid them; and asking, 'If you find Mr. Buchanan won't pay them, please let me know, so that I can make an effort to do so.' In view of this evidence the court instructed the jury that Mabel Buchanan had an interest in that certificate. It is true that it is one that was subject to the voluntary control of her father. Therefore she had certain rights, and, if her father was insane, or incapable of attending to business, she had a right to keep this certificate alive; and, when she notified the proper officer, if she did, of her intention to keep it alive notwithstanding what her father might do, she had a right to do it. If he was capable of acting, no action of hers would keep it alive, because he had the power to destroy her rights at any time. But, if he was incapable of acting, she would have the right to say to

this officer of this society, 'My father is not capable of attending to this matter, and I will pay these assessments until he is.' The conculsion of the whole matter was stated as follows: 'Now, if her father was in such actual condition as to make him incapable of acting in this matter, she, as the beneficiary, had a right to pay the assessments, and when she asked to be informed of any assessments that were due I think it was the duty of the officers to notify her before any suspension was made; and, if they neglected to do it, then they could not work any suspension of this certificate." This is the substantial testimony in the case. There is abundant authority for the position of the plaintiff's counsel that where the certificate of a beneficial association provides that a failure to pay any assessment within a certain time shall render it null and void, time is of the essence of the contract, and failure to pay within the time designated renders the certificate null and void; and that, where there is no provision of the contract which declares expressly or by necessary implication that sickness or insanity or similar incapacity shall excuse the payment of any assessment on the day it is due, the courts will not grant relief against such contingency. This is simply to hold that every one is bound by his contract deliberately made. However, the reasons for this seemingly hard rule are indicated in Bac. Ben. Soc. No. 384, where he says neither insanity, sickness, nor absence is an excuse for nonpayment of assessments, the payment being an act that can be performed by the member or by some other person. This marks the distinction between this case, and those to which he finds the rule to have been applied. The statement of the text is possibly too broad, but certainly any one related to the member or interested in his estate may come to his relief under such circumstances, and especially when he is named as his beneficiary under his certificate. The beneficiary has an interest in the certificate, and, although it does not become absolute until the death, it is an actually existing interest until annulled under the rules of the order. So long as it remains in force, it belongs to him exclusively. Upon the death of a member it passes to the beneficiary as his own, and not as representative of a member. Hamill v. Supreme Council 152 Pa. St

537, 25 Atl. 645. If the plaintiff, having knowledge of the assessment, had offered to pay it to the proper officer, there can be no question but what he would be bound to accept it, When the offer was made in advance, good faith required that the beneficiary should have the opportunity to preserve her rights, not against the voluntary act of the member, but against neglect caused by his inability to act. She was, therefore, entitled to notice upon proper request made. No notice was given, and it appears from the evidence that neither the plaintiff nor her mother had knowledge of the assessment; and, if plaintiff had actual knowledge of the assessment, it would be fatal to her claim. This gives pertinency to the testimony of the plaintiff and her mother that they did not see or know of the notice by publication. The only other question is as to the party to whom the request for notice was made. Plaintiff's request was sent to the financier of the local conclave. He is the only officer with whom individual members come in contact. To him all assessments are paid, and the order should be bound by his acts. The question in this case seems to be new. We think the law ought to be and is as given to the jury, and a new trial must therefore be refused."

Per Curiam. We find no error in this record. For reasons given by the learned trial judge in his opinion refusing a new trial, the judgment should not be disturbed. Judgment affirmed.

Accord. The beneficiary in a policy has such relation to the contracting parties, and such an interest in the maintenance of the policy as entitles him to pay the premium. Hamill v. Supreme Council of R. A., 152 Pa. St. 537; Continental Ins. Co. v. Daly, 33 Kan. 601; Miller v. Union Cnt. L. Ins. Co., 110 Ill. 102; Union Mut. L. Ins. Co. v. McMillen, 24 O. St. 67; Garner v. Germania L. Ins. Co., 110 N. Y. 266.

SEIVERTS v. NATIONAL BEN. ASS'N OF MINNEAPOLIS.

Supreme Court of Iowa. Oct. 15, 1895. 95 Iowa, 710.

Reinstatement. Misrepresentations.

Deemer, J. The defendant is a life insurance association organized under the laws of the state of Minnesota, with its principle place of business at Minneapolis. On the 9th of August, 1888, Fritz Seiverts, residing at Neola, Iowa, made application to defendant for membership in the company, and for insurance upon his life in a sum not exceeding $5,000, payable, in case of his death, to his wife, the plaintiff herein. This application was received by defendant company at Minneapolis, on August 11, 1888, and the same was approved, and certificates issued to Seiverts on August 14, 1888. Seiverts died in Montana on November 28, 1892, of cancer of the stomach. This suit was brought to compel defendant company to levy an assessment upon its members to pay the amount called for by the certificates. The defense, as before stated, is: First, That the assured misrepresented his age, in his application for insurance, in that he stated in the application he was born in the year 1843. Second. That on the 1st day of May an assessment was levied by defendant company upon each of its members to pay death losses, and that Seiverts failed to pay the same when due; that afterwards he paid the same, under a provision for reinstatement, and furnished a health certificate, which was required as a condition for reinstatement, but that the health certificate was false and untrue; and that the policy became void by reason of these misrepresentations.

1. The application was not made a part of the policy, as required by the laws of this state; and it is insisted that the misrepresentations as to age, even if made, cannot be taken advantage of by the defendant. Defendant contends that the contract was made in Minnesota, and is to be governed by the laws of that state; that in Minnesota there is no requirement that the application be attached to or made a part of the

policy; and that the representation made by the assured was a warranty, which, if untrue, avoids the policy. The plaintiff, by motion, attacked that part of the answer pleading the misrepresentation as to age, on the theory that the contract was made in this state, and that the defense here interposed was not permissible, because of the provisions of McClain's Code, No. 1733; but the lower court overruled it, holding that the contract was made in Minnesota. No appeal was taken from this ruling, and we must accept it as being correct. We look then to the testimony relied upon to prove the alleged misrepresentation, and find that it consists of alleged statements made by the assured after the issuance of the policy—which, as we have seen, made plaintiff the beneficiary—as to the time of his birth, and as to his health. Although not necessary to a determination of the case, as we view it, it is extremely doubtful whether such testimony is admissible. See Tessmann v. Supreme Commandery (Mich.) 61 N. W. 261; Nibl. Mut. Ben. Soc. No. 377; Bac. Ben. Soc. No. 460. But, however this may be, our statutes (Acts 16th Gen. Assem. c. 55, No. 3) provide in substance, that when it shall be discovered that an assured has misstated his age, in an application for insurance, the company issuing the policy shall be permitted to demand and collect the difference of premium, if any, which would be due and payable on account of the true age of the assured, from year to year, according to the rates of premium of the company upon which the policy was issued, or such company may, after the decease of the assured, deduct from the amount payable by such policy the difference of premium, if any, which would so have been payable from year to year, by reason of any difference of age at the time of issuance of such policy, and no other defense shall be permitted, notwithstanding any warranty as to age, except when it be shown by the company issuing the policy that the policy was procured by fraud in fact. It will be presumed, in the absence of all evidence to the contrary, that the laws of Minnesota are the same as this statute of our own state. Davis v. Railroad Co., 83 Iowa, 744, 49 N. W. 77, and cases cited; German Bank v. American Fire Ins. Co., 83 Iowa, 491, 50 N. W. 53; Crafts v. Clark, 38 Iowa, 237; Sayre v. Wheeler, 32

Iowa, 559; Neese v. Insurance Co., 55 Iowa, 604, 8 N. W. 450; Bean v. Briggs, 4 Iowa, 465. From the evidence we find that the only misrepresentation as to age was one year,—that is, the deceased was 39, instead of 38, when his policy of insurance was issued; and, turning to the by-laws, we find that the assessments and dues are the same, whether the age is 38 or 39. So that there is no penalty, under the laws of this state, for the misrepresentation as to age; and the misrepresentation, even if established, will not avoid the policy.

2. At the time the policy was issued the by-laws provided for an assessment upon each of the members of the association to meet death losses, payable within 30 days from the day of notice. They also provided that, within 15 days after an assessment became due, the member may pay the same at the home office, by paying in addition thereto the sum of 25 cents. After the assured became a member of the company this last provision of the by-laws was changed, and a by-law was adopted providing for reinstatement within 15 days, by paying the extra 25 cents, if the assured was then in good health. On May 1, 1892, the defendant made an assessment to pay six death losses. Due notice of this was given the assured, and he was notified to pay the sum on or before June 1, 1892. The assured did not respond to this notice, and the company then gave him another, the exact terms of which are in dispute, but which notified him that he must make payment of the May assessment by June 20, 1892, and, as the company claims, required him to fill up and return a health certificate. On the 13th day of June, 1892, plaintiff procured a draft for the amount of the assessment, and immediately forwarded it to the defendant. Defendant received the draft on the 15th day of June, and immediately returned a health certificate to the assured, requesting him to fill it out and return to them. Seiverts filled out this certificate of health, and returned it to the company. The exact date at which this certificate was signed by the assured is not shown, but it reached the company about June 20, 1892. This certificate represented that assured was free from all ailments since the date of the original certificates, and that he was then of sound constitution and good health. The assured was

thereupon reinstated in the defendant company, and thereafter assessments and calls were made upon him, which were promptly paid up to the time of his death. The defendant contends that at the time this health certificate was signed the assured was not in good health, and that he had suffered with bodily ailments since the issuance of the original certificates, at the time he made the health certificates, and that the certificates are void for that reason. On the other hand, plaintiff insists that defendant had no right or authority to insist upon a health certificate, as a condition precedent to reinstatement, because neither the by-laws nor his certificat of membership required it when he became a member, and the company could not make this additional requirement by amendment of its by-laws after the assured became a member, and had acquired vested rights. Plaintiff also denied any misrepresentations or false statements in the health certificate. The certificate issued to the assured contained this condition, which was expressly made a part of the contract, viz.: "Provided, that a member may, within fifteen days after his assessment becomes due, be reinstated, by the payment of the assessment, with the addition of a fine of twenty-five cents." By the terms of the contract, the assured had the absolute right of reinstatement at any time within 15 days, by paying the assessment, with 25 cents in addition. Defendant could not thereafter adopt a by-law requiring a health certificate in addition, which would be retroactive in its operation, unless such right was expressly reserved in the contract. Hobbs v. Association, 82 Iowa, 107, 47 N. W. 983; Courtney v. Association (Iowa) 53 N. W. 238.

Defendant insists, however, that it reserved this right in the following condition printed on the back of the certificate: "The member herein agrees to conform to all the lawful regulations and by-laws made for the government of this association." We do not think this constitutes an agreement to be bound by any change which might be made in his contractual rights after the issuance of the certificate. It has frequently been held that a corporation has no authority, as the legislature from which it derives its existence has no competency, by laws of its own enactment, to disturb or destroy rights

which it has created, or to impair the obligation of contracts, or change the responsibility to its members, or to draw them into new and distinct relations. See Supreme Commandery v. Ainsworth, 71 Ala. 436; Morrison v. Insurance Co., 59 Wis. 162, 18 N. W. 13; Society v. McVey, 92 Pa. St. 510; Stewart v. Association (Miss.) 1 South. 743; Pulford v. Fire Department, 31 Mich. 458. We are of opinion, however, that, if this amended by-law was binding upon the assured, the defendant has failed to show such misstatement in the health certificate as avoids the reinstatement. It is a general rule, in construing policies of life insurance, that, before any ailment can be said to be a disease, it must be such as to indicate a vice in the constitution, or be so serious as to have some bearing upon the general health and continuance of life, or such as, according to common understanding, would be called a "disease." Cushman v. Insurance Co., 70 N. Y. 73, and authorities cited. It would be most unreasonable to construe the term "sound health," as used in life insurance, to mean that the assured is absolutely free from all bodily infirmities, or tendencies to disease. If this were its true meaning, few persons of middle age could truthfully say they were in sound health. See May, Ins. § 295; Bac. Ben. Soc. § 232. It is shown in this case that, a short time before the time the health certificate was issued, deceased had a cold, and complained some of his chest, but continued at his work until the latter part of June, 1892. A physician was not called until June 26, 1892. Not until July 10th was the physician able to discover anything serious with his stomach. The presence of the disease which finally took his life was not detected by the physician until some time in July, and even then it had not progressed far enough to give undoubted evidence that the trouble was cancer of the stomach. Indeed, the exact nature of the disease was not discovered until just before his death. We think defendant has failed to show such misstatements in the health certificate as will avoid the reinstatement of the assured in the company, even if it be held that the amended by-law was binding upon plaintiff and the assured. See Bac. Ben. Soc. § 234. From what we have said, it is apparent that our views coincide with those of the learned district judge, and the decree is affirmed.

JOHANSON v. GRAND LODGE A. O. U. W. OF UTAH, WYOMING, AND IDAHO.

Supreme Court of Utah. July 25, 1906. 31 Utah 45.

Subordinate Lodge—Financier—Agent.

Straup, J. 1. This is an action brought by respondent against the appellant to recover on a certificate or policy of insurance. A trial before a jury resulted in a verdict and a judgment in favor of the respondent. In May, 1903, George E. Johanson, husband of the respondent, became a member of Mullan Lodge, No. 22, A. O. U. W., located at Mullan, Idaho, a subordinate lodge and under the jurisdiction of appellant, the Grand Lodge of Utah, Idaho, and Wyoming. There was also a Supreme Lodge having jurisdiction over the Grand Lodges. Under the laws of the order each workman degree member was liable for all assessments for the beneficiary and the guaranty funds. If a member failed or neglected to pay the assessments to the financier of the subordinate lodge of which he was a member on or before the 28th of the month in which the assessments were made, he forfeited all rights of membership and stood suspended until reinstated. It was further provided that, when an assesment had been made upon the members by the Grand Recorder, it should be the duty of the lodge to see that the assessment was duly collected from each member who had received the workman degree; that the financier (of the subordinate lodge) should keep a full, true, and correct account between the lodge and each member, receive all moneys for the lodge, and pay the same to the receiver immediately, taking his receipt therefor. Provision is also made that he shall notify all members of arrears, make out a return of the finances to the lodge, a report of the semiannual tax due by the lodge to the Grand Lodge, furnish the recorder with a list of all members and their standing in the lodge and entitled to vote, and shall perform such other duties as are required of him by the beneficiary rules. Johanson paid all assessments up to and including the 31st day of December, 1903, and it is conceded that he was a

member in good standing on January 1, 1904. On account of sickness and inability to work, Johanson made application to the subordinate lodge for assistance, and on January 5, 1904, the lodge, at a regular meeting, took action in the premises, whereby it made a loan to him for four month's assessments, or for January, February, March, and April, all of which was made of record. On January 28, 1904, the financier of Mullan Lodge wrote to Johanson, who was then in South Dakota, concerning the action of the lodge, in which he said: "The action taken on your case was to carry you for dues and assessments for four months, or until after the 1st of May. And at the expiration of that time you will have to make further application to this lodge. * * * You are held in good standing on the books and at the Grand Lodge also. This amount is simply loaned to you, for after you recover they expect you to pay." The lodge paid the dues and assessments for January and February. On March 15, 1904, without notice to or knowledge of Johanson, the lodge reconsidered its action taken on January 5th, and declined to pay his assessments for March and April, and a few days after March 28th, suspended him for nonpayment of the March assessment. Johanson was not notified of such action until by letter from the financier to him, on May 4, 1904, in which the financier informed him that he was suspended on March 28th, that it was necesary that he be re-examined and reinstated by a majority vote of the lodge, and that the money due the lodge would have to be paid before the case could be considered. On receipt of this letter Johanson declined to be bound by the action of the lodge suspending him, and being in failing health was not able to pass a medical examination for reinstatement, had he desired to do so. He remitted payments for all assessements for May, June, and July, which were all returned to him by the financier under the direction of the subordinate lodge. Johanson died July 28, 1904.

The respondent testified that the deceased did not receive any communication or notice of any sort, from Mullan Lodge or the Grand Lodge, concerning the subsequent action of the subordinate lodge or his suspension, prior to the letter of May 4th. It is not claimed that any communication was sent to

him prior thereto, except a letter written by the financier on April 22d; but in that letter the deceased was not informed of his suspension, or the action taken by the lodge on March 15th. The respondent further testified that her husband relied upon the action taken by the lodge on January 5th, and the letter written to him by the financier on January 28th, and because thereof relied upon the fact that it would not be necessary for him to make further payment to the lodge until after May 1st, and that, if the lodge had not taken such action, she and her husband would have borrowed money and would have paid the assessments.

2. The principle point of contention made by the appellant is that the subordinate lodge and the financier were (1) the agents of the deceased, and (2) that, if they were not his agents, but were the agents of the Grand Lodge, they had no authority to enter into the arrangement that was made; that the subordinate lodge and the financier were authorized merely to collect the assessments as declared and to transmit them to the Grand Lodge, and that they were without authority to extend the time, or make any conditions, of payment; and that if the deceased failed to pay the assessments in cash, on or before the 28th of the month as required by the laws of the order, he did so at his peril. These questions were presented on objections to the introduction of evidence relating to the facts hereinbefore recited, and in requests to charge. The question as to whether the subordinate lodge and the financier were agents of the deceased, or agents of the Grand Lodge, is easily determined. It has been generally held, in similar cases, that they were agents of the Grand Lodge. Knights of Pythias v. Withers, 177 U. S. 260, 20 Sup. Ct. 611 44 L. Ed. 762; Murphy v. Independent Order of the Sons and Daughters of Jacob, 77 Miss. 836, 27 South. 624, 50 L. R. A. 111; Bragaw v. Supreme Lodge K. & L. of Honor, 128 N. C. 354, 38 S. E. 905, 54 L. R. A. 602; Schunck v. Gegenseitiger, etc., Fond, 44 Wis. 369; Fraternal Aid Ass'n v. Powers, 67 Kan. 420, 73 Pac. 65; Brown v. Supreme Court I. O. F., 176 N. Y. 132, 68 N. E. 145; Niblack, Ben. Soc. (2d Ed.) pp. 516-512. 1 Bacon,. Ben. Soc. (3d Ed.) § 148. Whether the subordinate lodge was without authority

to do what was here done by it, and whether it bore a relation to the Grand Lodge of something more than a mere agent, or whether what it did, as to the Grand Lodge, amounted to a waiver of a strict compliance of the laws of the order with respect to paying assessments, is more difficult of solution. However, in one view taken by us of the case, it does not render it necessary to fully treat of the powers of the subordinate lodge with respect to the transaction, or to specially define its legal relation to the Grand Lodge. The authorities are to the effect that if the deceased had actually paid the assessments in money to the proper officers of the subordinate lodge, and that they, or the lodge controlling their action, failed or neglected to transmit it to the Grand Lodge, such failure or neglect would be chargeable to the Grand Lodge and not to the deceased, on the principles of law that they were not his agents.

Counsel for appellant, in their brief, speak of and treat the action of the subordinate lodge of January 5th, as a loan by it to the deceased, as did also the financier in his letter to the deceased. What is said in defense thereto is that the Grand Lodge is not bound by it. But, when it is conceded that the lodge loaned the deceased sufficient money to pay the assessments, it necessarily carries the implication of an appropriation of so much of its funds for such purpose, to the same extent as though it had actually counted out to him so much cash which was immediately returned by him to it in payment of the assessments. Undoubtedly the transaction was so intended and treated by the parties to it. To consider it otherwise is to construe the transaction not a loan, but something different from what all the parties said it was. When the subordinate lodge on January 5th loaned to the deceased sufficient money to pay the assessments, and it then had the money on hand, which must necessarily be implied from the loan, it then had in its possession money received from the deceased in payment of the assessments, the same as though he had otherwise paid it in cash; and the failure of the subordinate lodge to transmit it to the Grand Lodge cannot be chargeable to him. The fact that the subordinate lodge, on March 5th, reconsidered its action with respect to the loan,

amounts to nothing. It either loaned the deceased, on January 5th, sufficient money to pay the assessments or it did not. Counsel for appellant say the record of the subordinate lodge and the correspondence between it and the deceased show that it did. If so, then the money belonged to the Grand Lodge, and ought to have been paid to it by the subordinate lodge. The failure to do so cannot be excused nor be charged to the deceased, because the subordinate lodge thereafter saw fit to attempt a repudiation of the loan in manner that it did, for such action amounted merely to a misappropriation of money not then belonging to it, but belonging to the Grand Lodge.

3. Furthermore "forfeitures are not favored in the law, and courts, in order to avoid the odious results of a forfeiture, are not slow in seizing hold of such circumstances as may have been acted upon in good faith and which indicate an agreement on the part of the company or an election to waive strict compliance with the conditions and stipulations in the policy." Sweetser v. Odd Fellows' Mutual Aid Ass'n., 117 Ind. 97, 19 N. E. 722. By reason of the action of the lodge on January 5th and of the letter from its financier to the deceased, he was induced to believe and to rely on the assurances made to him that he was not required to make any payment of assessments until after May 1st, and that until then he was in good standing in the subordinate and in the Grand Lodge. Having made such assurances when the lodge thereafter and on March 15th, without notice to him, reconsidered its action, and on March 28th, suspended him for nonpayment of the March assessment, with knowledge on its part that because of his failing health and continued disability he could not pass the required medical examination to enable him to be reinstated, and not even notifying him of its action of reconsideration or of his suspension until May 4th, and after it had received from him one month's assessment, it acted in a manner which indicates a course of dealing not very commendable. The lodge well knowing that the deceased was relying on the arrangement made with it to keep alive his policy of insurance, if, for any reason, it found that it could not or ought not to carry it out, fairness required that it

should have given him sufficient notice thereof, so that if he had chosen not to consider the assessments as paid, an opportunity would have been afforded him to pay them and prevent a forfeiture of his policy. While it may not have been so intended, yet, had the lodge undertaken to mislead him in order to bring about a suspension and a forfeiture of his policy, we see no course which tended more to accomplish such purpose than the one pursued by it.

Viewing the case from the standpoint that the payments were not made as required by the laws of the order, it is clear that the subordinate lodge waived such requirements. The pertinent inquiry then is, is the Grand Lodge bound by such a waiver? It is said that it is not binding on the Grand Lodge because the subordinate lodge was a mere agent authorized to collect and transmit the assessments; that the deceased was bound to know the laws of the order requiring him to pay the assessments to the financier on or before the 28th day of the month, and that the subordinate lodge was without authority to waive or deviate from these provisions. But, as disclosed by the record, the subordinate lodge bore a relation to the Grand Lodge of something more than a mere collecting agency. By express provisions of the laws of the order the duty to see that the assesments were collected rested upon the subordinate lodge. It was expressly given the power to suspend its members for nonpayment of assessments, and thereafter to reinstate them on payment of deferred or overdue assessments, without notice to or direction from the Grand Lodge. Through the exercise of its powers of suspension, it was given the power to terminate and annul the policy of insurance held by the member and issued to him by the Grand Lodge. Through the exercise of its powers in reinstating the member, it was given the power to rehabilitate the contract of insurance. It sat in judgment upon the good standing of the member, which good standing was a requisite to the validity of, and a liability on, the policy. In other particulars it was given the right to exercise powers and to perform offices with respect to its members, which directly affected their rights in and to the contract of insurance, and their contractual relation with the Grand Lodge as evidenced by the policy. The

right to do these things and the power to exercise such functions, without notice to or direction from the Grand Lodge, constituted the subordinate lodge something more than a mere ministerial agent of the Grand Lodge. Under such circumstances the authorities support the doctrine that the subordinate lodge was clothed with authority to waive a strict compliance with the laws of the order relating to the payment of assessments, and when so waived by it, and acted upon by the member in good faith, the waiver is binding on the Grand Lodge.

In Wallace v. Mystic Circle, 121 Mich. 263, 80 N. W. 6, it was held: "A mutual benefit society which lays upon the local lodges the duty of collecting assessments, giving them full power in respect thereto, including the right to reinstate members suspended for nonpayment, without notice to the supreme lodge of such reinstatement if made within 90 days after suspension, cannot defeat an action for death benefits by showing that a by-law of the society provided that assessments should be paid within 20 days after notice, or the member stand suspended from beneficial membership, and that the deceased had been in arrears in his last assessment for 40 days prior to his death, where it appears that the lodge of which deceased was a member had induced its members to believe, through a long-continued practice of receiving assessments after due without declaring a forfeiture, that a delay of less than 90 days would not imperil their rights." In Grand Lodge A. O. U. W. v. Lachmann, 199 Ill. 140, 64 N. E. 1022. "In an action against a benefit society upon a benefit certificate, where the defendant denies liability upon the ground of the failure of the deceased to pay a certain assessment on the 28th day of February, at which time, under the constitution, he would be regarded as suspended and his rights forfeited, a notice from the subordinate lodge of which the deceased was a member that his assessment must be paid by March 25th is admissible, as tending to show a waiver of the provision for immediate forfeiture." In that case it was further observed: "The notice of the 15th of March certainly had a tendency to induce, in the mind of Benjamin Lachmann the belief that he would remain a member of the

order, in good standing, until the 25th of March, and that he would not stand suspended until after that time. It is said he knew, and was bound to know, that he was suspended, from the constitution and by-laws of the order, which entered into and were a part of his contract with the lodge, from and after February 28th, for a failure to pay the assesments due on that day. It is true that, by the letter of the contract, that was the effect of the nonpayment of the assessments on that day, but he also knew that that requirement could be waived, and also that by the terms of the same contract the suspension would be removed if he paid within 30 days.

The giving of that notice, as well as the habit of the lodge, would lead any reasonable mind to the conclusion that within 30 days forfeiture for nonpayment of assessment would not be insisted upon. That Lachmann did so understand is shown by the fact that he had placed the notice, with the amount of money it called for, in his desk, and expressed the intention of paying it the next night, but suddenly died on the 24th. It is said by counsel for appellant the question is not what the deceased believed or had a right to believe from the notice, but was he by the notice prevented from acting, or influenced to act, in any manner different from that in which he would have acted had he not received the notice? We think the evidence fairly tended to show that he was induced to delay the payment of money to the financier by the statement in the notice that he had until March 25th, at 8 o'clock p. m., to make it, and in effect, that he would only stand suspended after that time." In the case of McCorkle v. Ins. Association, 71 Tex. 149, 8 S. W. 516. "An act or promise of an officer superintending the business of a mutual benefit association, although beyond his power as defined in the by-laws of the association, if acted upon by a member, will bind the company." In Supreme Lodge K. of H. v. Davis, 26 Colo. 252, 58 Pac. 595. "In a mutual benevolent order composed of a supreme lodge and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assess-

ments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer in collecting and forwarding assessments shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection." In the case of Van Houten v. Pine, 38 N. J. Eq. 72, a director of the society called upon a sick member who was insured in the society. The sick member said to him that an assessment was due on the following Friday, that he could send out and borrow the money to pay it, but that he expected some money on the following Monday, and didn't like to borrow it. He asked the director to pay the assessment for him promising to repay him on the following Monday. The director assured him that he would pay it for him at once, but neglected to do so and the society claimed that his rights were forfeited. The court held that the promise of the director was one upon which the member had a right to rely and that the member should be reinstated. In line with the foregoing authorities are also the following: Whiteside v. Supreme Conclave (C. C.) 82 Fed. 275; Alexander v. Grand Lodge A. O. U. W., 119 Iowa, 519; 93 N. W. 508; Coverdale v. Royal Arcanum, 193 Ill. 91, 61 N. E. 915; Loughridge v. Iowa L. & E. Ass'n 84 Iowa 141, 50 N. W. 568; Moore v. Order of Ry. Conductors, 90 Iowa 721, 57 N. W. 623; Whitnes v. Nat. Masonic Accident Ass'n. 57 Minn. 472, 59 N. W. 943; National Mutual Ben. Ass'n. v. Jones, 84 Ky. 110; Courtney v. St. Louis Police Relief Ass'n. 101 Mo. App. 261, 73 S. W. 878; 2 Bacon, Ben. Soc. (3d Ed.) No. 434a.

The judgment of the court below is affirmed, with costs.

SUPREME LODGE KNIGHTS OF PYTHIAS v. LA MALTA et al.

Supreme Court of Tennessee. June 15, 1895. 95 Tenn. 157.

Conditions Subsequent. Delegate Authority.

Caldwell, J. On the 14th day of May, 1889, the Supreme Lodge Knights of Pythias of the World issued to Frederick Schuman, of Memphis, Tenn., a "Certificate of Membership" in the endowment rank of that order, whereby it bound itself to pay to his children, Lotta S. and Frederick E. Schuman, the sum of $3,000 upon his death in good standing. The children so named as beneficiaries died on the 30th of January, 1893, and Schuman himself died the next day. By the terms of the certificate and the laws of the order, all interest of the children ceased and determined upon and in consequence of their death in the father's lifetime, and upon his death without having nominated some other beneficiary all rights under the certificate passed to his next of kin and legatees under his will. Upon refusal to pay, Frederick Schuman's executrix and next of kin brought this suit in the circuit court of Shelby county to recover from the Supreme Lodge Knights of Pythias the full sum named in the certificate. Verdict was returned and judgment pronounced in favor of the plaintiffs, and the defendant appealed in error. The only real defense made in the court below was that Schuman, the assured, took his own life, and thereby, under the laws of the order, forfeited and annulled his certificate of membership, and absolved the defendant from all obligations to pay the same; and the rulings of the trial judge, in his charge as given, and in his refusal to instruct the jury as requested, upon the question of suicide, are in this court assigned as error.

It was admitted on the trial in the court below "that on the morning of the 30th of January, 1893, the two children of Fred Schuman were found in bed with him, dead, and that he was then insensible, and died on the 31st of

January, 1893, and that his death and that of his children was caused by opium, or morphine, given by him to the children and taken by himself." It was also admitted that "Fred Schuman was much attached to these children and treated them very tenderly," that he died in good standing, and that payment of his certificate was refused alone upon the ground that he committed suicide."

The order of Knights of Pythias is not a regular life insurance company; but it is a benevolent association, with life insurance as one feature, to be enjoyed or not by each particular member at his own election, and upon certain terms and conditions. The laws of this order, as of other benevolent associations, when applicable and not in conflict with federal and state laws, or contrary to public policy, are to be taken as parts of its contracts with its members, and as such are of great moment in the determination and enforcement of their respective rights and obligations under those contracts. Bac. Ben. Soc. §§ 161, 185; Tennessee Lodge v. Ladd, 5 Lea, 720, 721; Catholic Knights v. Kuhn, 91 Tenn. 216, 18 S. W. 385. At the time Schuman applied for and obtained the certificate in suit, the order of Knights of Pythias had no law against suicide, but the defendant insists that such a law was enacted before his death, and that it became binding upon him at once, and upon those who should claim under him. His written application for membership in the endowment rank contains this statement: "I hereby agree to conform to and obey the laws, rules, and regulations of the order governing this rank, now in force or that may hereafter be enacted, or submit to the penalties therein contained," and the certificate of membership recites upon its face that the consideration upon which it is issued is, among other things, "the full compliance," by Schuman, "with all the laws governing this rank, now in force or that may hereafter be enacted." These stipulations in the application and certificate were binding upon Schuman while he lived, and they are equally binding upon the plaintiffs since his death, and in consequence thereof the anti-suicide law, relied upon as a defense to this action, though enacted subsequent to the filing

of the application and issuance of the certificate, became operative against him and them from the time it was passed, provided, only, that its passage was accomplished in such a manner as to make it a valid law of the order. Supreme Commandery v. Ainsworth, 71 Ala. 436. The law in question was passed by the "Board of Control of the Endowment Rank, Knights of Pythias," in regular quarterly session, on the 12th and 13th of January, 1893, as an amendment to article 6, § 1 of the "General Laws" of said rank, and it is as follows: "If the death of any member of the endowment rank heretofore admitted into the first, second, third or fourth classes, or hereafter admitted, shall result from self-destruction, either voluntary or involuntary, whether such member shall be sane or insane, at the time, or if such death shall be caused or superinduced by the use of intoxicating liquors, narcotics, or opiates, or in consequence of a duel, or at the hands of justice, or in violation or attempted violation of any criminal law, then in such case the certificate issued to such member, and all claims against said endowment rank on account of such membership shall be forfeited."

Had the board of control legal authority and power to pass such a law? His honor, the trial judge, instructed the jury in effect that it had not, and that, for that reason, the supposed law was invalid, and without force or virtue in this case; and, entertaining that opinion, he also refused to instruct the jury upon the request of the defendant, that such law was operative against the plaintiffs, and, upon the admitted facts, a complete answer and bar to their action. Undoubtedly, such a provision against self-destruction is reasonable, and, being so, it is, as previously stated herein, binding upon Schuman, and upon those claiming under him, if validly enacted. The fact that its enactment was subsequent to the date of his certificate is rendered unimportant by the stipulations in the application and in the certificate itself, whereby he bound himself irrevocably to full obedience and submission to all legislation, then in existence or thereafter enacted for the government of the endowment rank, of which he was be-

coming a member. Those stipulations, however, though in the broadest terms, must be construed as relating to and embracing only such laws as the order had the legal right to make, and as it should make in a legal and binding form.

The Supreme Lodge Knights of Pythias of the World was incorporated, under an act of the congress of the United States on the 5th day of August, 1870. As then existing, the fundamental and general laws of the order contemplated one supreme lodge for all its membership in the world, one grand lodge for each state and territory of the Union, etc., and subordinate lodges for different towns and cities in those states, etc. All the powers of grand and subordinate lodges emanated from the supreme lodge. The grades of membership or of advancement in the subordinate lodges are three in number, called "Ranks"; and a member of the first rank is designated as a "Page", of the second rank as an "Esquire", and of the third rank as a "Knight." Representatives from all the subordinate lodges of any given state or territory compose the grand lodge of that particular jurisdiction, and representatives from all the grand lodges make up the membership of the supreme lodge. By the ninth and last section of its charter, obtained in 1870, the supreme lodge was granted ample "power to alter and amend its constitution and by-laws at will." Through an amendatory act of incorporation, obtained October 5, 1875, the charter of 1870 was changed in many particulars. One change was the complete annulment of section 5, and another was the appropriate substitution and diminution of the members of all succeeding sections until section 9 of the charter of 1870 became section 8 of the amended charter of 1875. The other amendments have no relation to the subject now under consideration, and hence will not be stated. On the 24th day of May, 1882, the charter of 1875 was amended, and among the changes made was the addition of a new section, at the end, as follows: "9. That the said supreme lodge shall have power to establish the uniform rank and the endowment rank upon such terms and conditions, and gov-

erned by such rules and regulations, as to the said supreme lodge may seem proper." This last amendment of its fundamental law undoubtedly conferred upon the supreme lodge plenary power to establish, maintain and control the endowment rank (which was, in fact, established several years prior to 1882); and if, in the exercise of that power, that body had enacted the law invoked by the defendant in this case, there could be no serious question as to its validity. But the truth is that only the board of control, and not the supreme lodge, passed that law. Had that board the requisite legal power for the enactment of such a law?

At its regular biennial session in April, 1884, the supreme lodge enacted a code of "General Laws" and adopted a "Constitution for the Government of Sections of the Endowment Rank." The endowment rank was not intended to be, and under the power granted to the supreme lodge could not have been, established as a separate organization, with full power to make its own laws. "Sections" of the endowment rank are intimately related to and connected with subordinate lodges. Only members of subordinate lodges, having obtained the rank of knight, and continuing in good standing as such, can have and maintain membership in sections of endowment rank. The establishment of the endowment rank only introduced into the order of Knights of Pythias a means of mutual insurance among knights desiring such a benefit and willing to bear the additional burdens thereof. Knights are not all members of endowment rank, but all members of endowment rank must be knights. By article 6 the general laws enacted by the supreme lodge in 1884 for the endowment rank, a "Board of Control" was created, with general powers of supervision of the business of that rank; and by article 7 of those laws, as well as by article 15 of the constitution adopted at the same time, the supreme lodge expressly reserved to itself full power of alternation and amendment of those laws and of that constitution, at any regular session. Amendments of both were made in 1886, and again in 1888. The constitution, as amended in

the latter year, was very lengthy and consisted of sixteen articles. Article 8 comprised 19 sections, relating especially to the board of control, its composition, and powers. Section 5 is in these words: "The board shall have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may from time to time provide. * * *" Section 9 is as follows: "The board is hereby authorized to enact general laws, rules, and regulations in conformity with this constitution, for the government of sections and the membership of endowment rank, and alter and amend such general laws, rules, and regulations, when in their judgment the needs of the rank require such action."

Here for the first time was it attempted to transfer the power of making laws for the endowment rank from the supreme lodge to the board of control; and this was done, not by an amendment of the charter of the supreme lodge, but only by legislation of the supreme lodge, passed in the ordinary way. That constitution continued in force until 1892, when the supreme lodge adopted another one of only six articles in its stead. Section 5 of article 8 of the constitution of 1888, as quoted above, became the fifth and last section of article 1 of the constitution of 1892; but section 9 of article 8 of the constitution of 1888, supra, was entirely omitted from the constitution of 1892, and no like provision was substituted for it. The constitution of 1892 was the one in force on the 12th and 13th of January, 1893, when the board of control passed the anti-suicide law, interposed by the defendant in this case.

Henry B. Stolte, a member of the board of control at that time, testified in this case, and, among other things, he said, in effect, that the said section 9 of article 8 of the constitution of 1888 was still in force when the anti-suicide law was passed in January, 1893; but that is only the opinion of the witness upon a legal question. The constitution of 1892 was adopted, certified, and promulgated as the "Constitution of the Endowment Rank Knights of Pythias of the World," and it was published by proper authority in pamphlet so entitled, as had been all former constitutions.

Each of the instruments so adopted and promulgated was, for its time, the complete and only constitution of the endowment rank; and no part of the former constitution became a part of the latter one, unless embodied in it. The constitution of 1892 was adopted, certified, promulgated, and printed as one full and complete instrument, and as the only constitution of the endowment rank so long as it should remain unchanged by the supreme lodge. It superseded the constitution of 1888 entirely, and left only such parts of it in force as were reproduced in the new instrument. This follows as a matter of law. No provision found in the constitution of 1892 conferred, or seems to have been intended to confer, upon the board of control power to make laws, as did section 9, art. 8, of the constitution of 1888. Section 5, art. 1, of the constitution of 1892, which is but a reproduction of section 5, art. 8, constitution of 1888, did not bestow legislative power, as is readily seen by reference to its terms, which are as follows: "The board should have entire charge and full control of the endowment rank, subject to such restrictions as the supreme lodge may from time to time provide."

Obviously, this provision relates alone to the administration of laws, and not to the enactment of them. The words, "entire charge and full control," as thus employed, impart executive, rather than legislative, functions. Section 9, art. 8, of the constitution of 1888, whose terms were unmistakable, and ample in scope for the purpose contemplated, contained the only provision to be found in any constitution of the endowment rank or elsewhere, intended to authorize the board of control to pass general laws for that rank; and it is evident that the members of that board believed that provision to be still in force, and that they thought they were acting under its authority when they passed the law involved in this case. As has already been observed, however, that provision ceased to exist, and had no further force or vitality, when it was omitted from the constitution of 1892, which completely superseded the constitution of 1888 with all its provisions. It follows that the board of control was without even the appearance of

the requisite legislative power when it passed that law in January, 1893, and, consequently, that the law was invalid ab initio. Even the authority granted by the supreme lodge to enact laws had been withdrawn from the board.

But if it were conceded that the witness Stolte, and the other members of the board of control, were right in their belief that the ninth section of article 8 of the constitution of 1888 was of the same virtue after, as before, the adoption of the constitution of 1892, the result in this case would be the same; because the supreme lodge had no power to confer general legislative functions upon the board of control, and its effort to do so was ineffectual and void. Section 9, art. 8, of the constitution of 1888, whereby the supreme lodge attempted in plain and comprehensive language to clothe the board of control with authority to enact general laws, was itself ultra vires, and without legal efficacy; and if embodied in the constitution of 1892, it would have afforded no legal authority for the passage of the anti-suicide law. The ninth section of the second amended charter of the supreme lodge vested in that body alone the power to legislate with respect to the endowment rank, and the supreme lodge could not legally delegate this power to another. That provision of the fundamental law fully authorized the supreme lodge to enact all such reasonable laws as it might deem proper for the establishment and government of the endowment rank, and, in the exercise of that broad authority, it might well create a board of control, or any other like agency, for the management of the business of that rank, but it could not abdicate its high position and transfer its law-making power to such board, or other agency. Though the supreme lodge may have had the fullest power, under its charter, to pass the law in question in this case, as we think it had, we have no hesitation in holding that it could not bestow such power upon the board of control. Under the existing charter, a general law of that character could be passed by the supreme lodge alone.

We do not hold that the supreme lodge may not lawfully authorize subordinate lodges and sections to pass by-

laws for their local government, nor that the board of control may not be empowered to adopt mere rules and regulations to facilitate the transaction of the business of the endowment rank. On the contrary, we think the supreme lodge may well grant such authority and power, and that they may be lawfully exercised, such grant and exercise not being inconsistent with the terms of the charter. 1 Bac. Ben. Soc. (New Ed.) § 80. Our holding is that only the supreme lodge has power to pass a general law affecting the whole endowment rank, such as that against self-destruction, and under consideration in this case. The rulings of the trial judge with respect to that law were correct for two reasons—First, because the supreme lodge had no power to authorize the board of control to enact that, or any other general law; and, secondly, because the authority to pass such laws, attempted and intended to be granted by section 9 of article 8 of the constitution of 1888, was withdrawn by the adoption of the constitution of 1892, which embraced no such provision. Affirm the judgment, with costs.

EMINENT HOUSEHOLD OF COLUMBIAN WOODSMEN v. KESTERSON.

Court of Appeals of Kentucky. Nov. 11, 1910. 131 S. W. 384.

Death in Combat.

Appeal from Circuit Court, Fulton County.

Action by Margueritte Kesterson against the Eminent Household of Columbian Woodsmen. Judgment for plaintiff, and defendant appeals. Affirmed.

O'Rear, J. Appellant is a secret fraternal society under the supervision of a supreme body, which insures its members through the lodge system exclusively. In consideration of certain premiums paid to it, it issued to Thomas

J. Kesterson, one of its members, designated as "guest," a written policy of insurance, which is called a "covenant." In the covenant is this condition: "If a guest holding a covenant shall be convicted of a felony, or expelled from the order, or becomes intemperate in the use of liquor, or the use of opiates, cocaine, chloral, or other narcotics, or poison, to such an extent as to impair his health, or shall die in consequence of a duel, or combat except in self-defense, or by the hands of a beneficiary, except by accident, or by the hands of justice, or by disease resulting from vicious, intemperate, or immoral acts on the part of such guest, or in consequence of violation or attempted violation of the law by such guest, the covenant shall be void and of no effect." Thomas J. Kesterson died while a member of the society and during the term covered by the covenant of insurance. This suit was brought by his widow, the beneficiary in the covenant, to recover the sum agreed to be paid upon his death during that period.

The answer contained this plea: "Now the defendant alleges that the insured, Thomas J. Kesterson, came to his death when he was violating and attempting to violate the law, in that he was attempting to take the life of, or do great bodily harm to, a fellow man, R. R. Rogers; and the defendant says that in consequence of his violation or attempted violation of the law the said Thomas J. Kesterson was killed by the said R. R. Rogers on the 31st day of October, 1908; and it says that by reason of his violation or attempted violation of the law, in attempting to kill or do great bodily injury to the said R. R. Rogers, he then and there forfeited the covenant sued on," etc. General demurrer was sustained to the answer. The defendant declining to plead further, judgment was rendered by default for the sum sued for.

The demurrer was properly sustained. Stripping the answer of allegations constituting legal conclusions of the pleader, such as "when he was violating or attempting to violate the law," the defense is that the insured, Kesterson, was attempting to take the life of or do great bodily harm to R. R. Rogers, and was killed by said Rogers. It

is not alleged that Kesterson was the assailant. It is not shown which began the affray. Enough is stated to show that there was an affray between Kesterson and Rogers; for it is said that Kesterson was trying to kill Rogers, and that Rogers killed Kesterson. Now the covenant contains an express stipulation covering such an incident. It is: "If a guest holding a covenant shall * * * die in consequence of a duel, or combat except in self-defense, * * * the covenant shall be void." For aught that appears, Kesterson and Rogers may have been engaged in a duel; at least they were, it appears, engaged in a combat, in which Kesterson lost his life. If the insurer would avail itself of a condition of the policy excusing it from liability, it must plead the facts showing their existence, so as to bring the case within the excepted clause.

A duel is a violation of law. So is a mortal combat. These are made specific causes for evading the policy. That the insured lost his life "in consequence of violation or attempted violation of law by him" is made an additional ground of defense by the covenant. It was not meant to repeat in this general expression that which had been particularly described in the preceding clause. The latter expression was intended to have embraced violations of the law in addition to those mentioned specifically. Construing the pleading most strongly against the pleader, an old and most familiar rule for testing its sufficiency upon demurrer, we find that the answer did not state matter constituting defense to the cause of action on the covenant. For all that appears, Kesterson may have been attempting to defend himself from Rogers when the latter took his life. In such event he was not violating the law, and his act was furthermore saved by the express exception contained in the qualifying clause which has been quoted.

Judgment affirmed.

GRAVES v. KNIGHTS OF THE MACCABEES OF THE WORLD.

Court of Appeals of New York. Oct. 28, 1910. 92 N. E. 792.

Fraternal Insurance—Membership.

Hiscock, J. This action was brought to recover on two certificates of insurance issued by the appellant on the life of one Graves and payable to the respondent, his wife. The sole defense is that all rights under these certificates had become forfeited because after their issue Graves became engaged in the sale of liquors in violation of one of appellant's by-laws. On the facts established in support of that defense hereafter recited, the trial court refused to hold as matter of law that there had been a violation, but allowed the jury to say whether there had been, and, the latter having answered this question in the negative, the appellate Division by a divided court have approved the course taken by the trial court and affirmed the judgment against the appellant.

We shall assume for the moment, reserving for subsequent consideration a single minor question, that the certificates on which suit is brought are subject to a regulation adopted by the appellant in 1895 and subsequently from time to time amplified, and which provided as follows: "Sec. 142. No person shall be admitted as a beneficial member of this order who is engaged in any of the following occupations: Blasting, coal mining, submarine operations, manufacturing highly inflammable or explosive materials nor who is an aeronaut or lineman in the employ of electric companies, either in the construction or repairing of lines over which the electric current passes, or who is engaged in any other occupation deemed extra hazardous by the Supreme Medical Examiner, and no person shall be eligible for membership in the order who is engaged either as principal, agent or servant in the manufacture or sale of spirituous, malt or vinous liquors as a beverage, and should any beneficial member of the order engage in any of the above named prohibited occupations after his admission, his benefit cer-

tificate shall become null and void from and after the date of his so engaging in such prohibited occupation, and he shall stand suspended from all rights to participate in the benefit funds of the order, * * * and the record keeper, when any such suspension takes place, shall not receive further assessments from such suspended member."

The acts proved by the appellant as constituting a violation and working a forfeiture of the certificates were the following: Graves, the insured, formed a partnership with his son for the purpose of carrying on a saloon business. He personally applied for and took out a license in the firm name, and the saloon was owned and operated for several months by said copartnership; there being nothing to indicate that the ordinary rules of ownership and legal control of the copartnership property and business, and of sharing in profits and losses, did not prevail. It was testified to, however, that, while Graves lived in the same house in which the saloon was conducted, he did not, as a matter of fact, take any part in the actual management of the business or in the sale of liquors. Under these circumstances, the courts below have permitted a recovery on the theory that the language of appellant's by-laws only prohibited an active or perhaps physical participation in, or relation to, the sale of liquors, and did not include a passive proprietary interest in the business.

No case has been cited which is controlling of the question now presented, and its decision, therefore, must be governed by the ordinary rules of construction. Applying these, we are of the opinion that, although the issue may seem somewhat close, the construction of the by-law thus far permitted is too narrow, and that it should have been held as matter of law that the acts of the insured were a violation of its terms and worked a forfeiture of the certificates.

It is beyond controversy that the appellant had a perfect right in a proper manner to adopt a by-law applicable to certificates thereafter issued which, as broadly as might be thought wise, would prohibit beneficial members from becoming engaged even indirectly in the business of manu-

facturing or selling liquors. In determining what it did do, we of course are mindful of the cardinal rules that when permissible a construction should be employed which will avoid forfeitures, and that the penalties for ambiguous words should be visited on him who has selected them. But necessarily before these rules can be of assistance to a party in such a case as this it must appear that the application to words of that fair and ordinary meaning which must be presumed to have been in the minds of the parties fails to make the intent clear and does in fact leave some uncertainty concerning whose solution intelligent men might reasonably differ and argue. We do not think that such uncertainty fairly arises from the clauses now before us for interpretation. The appellant evidently determined that there were risks incident to the liquor business which it did not care to incur under its certificates. It may have regarded them as moral or physical. While the latter especially would seem to be the greater in the case of one actually handling and passing out liquors, no one can say that they were absent in the case of one who was the owner and in legal control and possession of them and who had the opportunity, although he did not customarily choose to exercise it, to come in contact with them. Therefore, in the first place, as it seems to us there is no authority for assuming that the actual intent of the appellant must have been to direct its prohibition simply against those who happened for the time being to be in active physical contact with the manufacture or sale of liquors, and, in the second place, the language used does not seem to us to express such intent. Without stopping to analyze too much at length the various definitions adopted by the lexicographers, the word "engaged" used by the by-law may be regarded as the equivalent of the words "carry on," and the word "occupation" as meaning "business," so that we shall have a prohibition against carrying on the business of manufacturing or selling liquors. And when we have the clause thus formulated, it seems to us that any layman reasonably versed in the use and meaning of our language would undoubtedly conclude that a man was so carrying on such

business when it appeared that he was one of two partners who owned and operated it under licenses taken out by him personally, that presumably he furnished his share of the capital and was entitled to his share of the property and profits and to an equal voice in the control and conduct of the business, and that such conclusion would not be stayed simply because the assumed individual dwelling at the plaec of business elected for a longer or shorter period, and for one reason or another not to take that active part in the ordinary routine of business which both opportunity and legal right placed within his power.

We cannot help believing that, if we should limit the meaning of the by-law by magnifying the conclusiveness of the test of physical or active participation as desired by respondent, we should lay the foundation for many and perplexing refinements which eventually would lead far beyond what was or reasonably should have been anticipated when the by-law was framed.

To our mind the intent to give the by-law a broader meaning than the one thus urged, and to cover different phases of interest or participation including the present one, is emphasized by specifically making the prohibition apply to any one who is "engaged either as principal, agent or servant." A "servant" or "agent" would not be apt to have any proprietary interest, and, therefore, his connection would be established by the physical performance of various acts in the conduct of the business. Conversely, the word "principal" with its associations naturally suggests one whose relation is that of proprietor, and who, as commonly in the case of a principal, might elect to intrust the active conduct of the business to the agents and servants already referred to.

The argument of ex socüs noscitur is somewhat relied on to sustain the view thus far adopted by the courts. Our attention is called to the fact that, in the prior clause of the by-law which contains the provision with reference to the manufacture and sale of liquor, the words "engage" and "occupation" are used with reference to certain pursuits, just as in the case of the manufacture of or traffic in liquor,

and, inasmuch as the only objection to these other pursuits could be the risk of personal injury to one physically carrying them on, said words "engage" and "occupation" must mean a physical and active participation; that if said words have this meaning in one clause of the section they must have the same meaning in another clause, and, therefore, in connection with the manufacture and sale of liquors must mean active participation. We do not think that there is much force in this argument in this case. It is doubtless true that the increased risks incident to blasting, mining, and the manufacture and sale of explosives would be applicable only to those who were physically engaged in conducting such operations, and when we take into account the classification of these occupations as extrahazardous and examine the words used in this probihition, they might in most instances be fairly limited to the interpretation suggested by the respondent. For instance, we can hardly conceive of the prohibition against engaging in the occupation of blasting as being reasonably applicable to any one else than him who was actually engaged in carrying on the occupation, and we observe that the ambiguity which might be attached to the words "coal mining," originally used in this prohibition was removed in a subsequent law by substituting the words "coal miner," which were evidently intended to mean an actual worker in the mines. And even in this clause, in construing the prohibition against engaging in the occupation of "manufacturing highly inflammable or explosive material," we should find it difficult to say that the language did not include a partner in a firm carrying on such a business and who by reason of his interest might be led into the physical risks of the business even if temporarily he should suspend his active participation in the management of the business. And in this connection it is to be noted that while the risks of which avoidance was sought in the case of these "extra hazardous" occupations were purely physical risks, the objections which the appellant might feel to having a beneficial member engaged in the liquor business might fill a wider range and not be limited to physical contract with the business.

As was stated at the outset, no controlling authority has been cited or found which is decisive of the meaning of this by-law as applied to such facts as the present ones. The case of Tucker v. Knights of Maccabees, 128 App. Div. 918, 113 N. Y. Supp. 1149, affirmed, 198 N. Y. 577, 92 N. E. ——, however, proceeds quite a distance in the direction of determining as claimed by appellant that this by-law is not of the limited meaning urged by respondent. In the case it was held as matter of law that, if it was simply established that the decedent entered into a partnership engaged in the management of a hotel containing a bar at which liquors were sold and a liquor tax certificate was issued to the decedent and from time to time renewed for the benefit of the copartnership, the decedent was engaged in the sale of liquors within the prohibition of a by-law similar to the present one, although expressly appearing that he never purchased supplies for the bar or sold any liquor thereat, and a request to go to the jury on the question of engagement was denied.

Evidence was given tending to establish that, before the last certificate here involved was issued by the appellant, the beneficial member retired from the saloon business and turned his interest over to his son, and it is therefore claimed that for this reason said certificate was not subject to the provisions of the by-law. In this case, however, we think that it is apparent that the last certificate mentioned was simply issued in the place of a prior certificate for the purpose of designating a new beneficiary, and that on the evidence as now presented there is nothing to indicate that any greater rights were secured under the new certificate than existed under the one taken up, or that the issue of the later certificate operated as a waiver of any forfeiture which arose while the earlier certificate was outstanding. In fact, no such claim as that of waiver was made on the trial.

In accordance with these views, we think that the judgment must be reversed, and a new trial granted; costs to abide event.

Judgment reversed, etc.

Accord. Supreme Council Loyal League v. Moereschbaecher, 188 Ill. 9, 59 N. E. 17; Pauley v. Modern Woodmen of America, 113 Mo. 477, 87 S. W. 990; Langnecker v. Trustees of Grand Lodge A. O. U. W. of Wis., 111 Wis. 279, 55 L. R. A. 185, 87 N. W. 293.

Note. The provisions of the by-law were that no person who engages in the business of selling intoxicating liquor can be admitted or remain a member. *Held* that one who was a member and thereafter engaged in the business did not forfeit his membership, where no action was taken against him. Steinert v. United Brotherhood of Carpenters and Joiners of America, 91 Minn. 189, 97 N. W. 668. The society was organized for the sole benefit of practical members of the Roman Catholic Church. On failure to comply with the laws of the order, the member agreed to forfeit all rights under his membership. The member thereafter married the plaintiff and was married by a Protestant minister. *Held* the member was excommunicated by his own act and forfeited his membership without an action to expel. Barry v. Order of Catholic Knights of Wis., 119 Wis. 362, 96 N. W. 797. Where at the time of becoming a member there was no prohibition against a member engaging in the liquor business, and thereafter such a law was passed, it was held, that a member so engaged should be given a reasonable time in which to retire from the business. Modern Woodmen of America v. Weiland, 109 Ill. 340.

SUPREME RULING OF FRATERNAL MYSTIC CIRCLE v. ERICSON.

Court of Civil Appeals of Texas. June 22, 1910. On Rehearing, Oct. 19, 1910. 131 S. W. 92.

Rerating of Members.

Jenkins, J. A fraternal beneficial society, known as the Fraternal Mystic Circle, was incorporated under the laws of Ohio in December, 1884. This organization established a lodge in Austin, Tex., of which appellee became a member on March 3, 1893; he being at that time 48 years old. His certificate was for $3,000, and, in addition to mortuary benefits, entitled him to sick, disability, and old age benefits. His wife was named as the beneficiary in said certificate. The plan of the society at this time was to make assessments on the death of a

member to pay the mortuary benefits; the number of assessments depending on the number of deaths. The members were divided into "Circles," known as "Circle A, B, and C." Appellee was a member of Circle A. His assessments from the time he became a member of said order until after he was transferred, as hereinafter stated, were $3.30 each. In the early part of 1895 this order seems to have gotten into, or at least, anticipated some trouble with the Insurance Commissioner of Ohio. On April 27, 1895, a society was incorporated in Pennsylvania under the laws of that state, known as the "Supreme Ruling of the Mystic Circle." The supreme legislative body of the Ohio order was known by this name. On June 5, 1895, the "Fraternal Mystic Circle" of Ohio, through its supreme or ruling body, passed the following resolutions:

"Whereas, the Supreme Ruling of the Fraternal Mystic Circle has been issuing certificates to members of the Fraternal Mystic Circle, under which the payments of benefits are and have been provided for; and,

"Whereas, the said Supreme Ruling is an unincorporated body and voluntary association, [the association was incorporated, but its legislative body was not] and,

"Whereas, the Supreme Ruling of the Fraternal Mystic Circle is a corporation organized under the laws of the state of Pennsylvania; and,

"Whereas, it is deemed to be for the best interest of all such certificate holders, and of all other persons concerned, that the business of said association be carried on by an incorporated body;

"Therefore, be it resolved that all the memberships, assets and property of every kind and description belonging to it be and the same are hereby transferred, set over and assigned in perpetuity to the said the Supreme Ruling of the Fraternal Mystic Circle, a corporation as aforesaid, in consideration of which the corporation assumes and agrees to discharge all liabilities of whatever kind appertaining to this body.

"Resolved, further, that the trustees of this body be and they are hereby empowered and directed to make transfer of all their right to and control over the assets and securities of all kinds, held by them for the use and benefit of said certificate

holders, to the said the Supreme Ruling of the Fraternal Mystic Circle, the corporation aforesaid.

"Resolved, further, that the Supreme Mystic Ruler and the Supreme Recorder are hereby authorized to execute in behalf of this body, such instruments of writing as may be necessary to carry into effect the purposes and intent of the premises, and to sign such instrument or instruments officially, and affix the seal of this body thereto.

"Resolved, further, that the transfers, assignments and assumption, hereinbefore mentioned, shall take effect and be in force upon concurrent evidence of acceptance thereof being given by resolution or otherwise by the said the Supreme Ruling of the Fraternal Mystic Circle, a corporation aforesaid."

Thereupon the Pennsylvania corporation passed the following resolutions:

"Whereas, the Supreme Ruling of the Fraternal Mystic Circle, a voluntary association, at its regular annual session, holden in the city of Columbus, Ohio, on the fifth day of June, A. D. 1895, adopted certain resolutions with preamble, of which the following is a copy": Then follow resolutions as above set out, and concludes: "Now, therefore, be it resolved by this body, the Supreme Ruling of the Fraternal Mystic Circle, that in consideration of the transfer by said association of all its membership, property and assets, we hereby assume all the liabilities of every kind and description of said association in accordance with the resolutions hereinbefore set out, and we hereby agree to faithfully discharge all obligations due to persons holding certificates issued by said association, and their beneficiaries."

The appellee accepted the terms of said transfer, and thereupon became a member of the Pennsylvania corporation, the appellant herein. The appellee's certificate was changed February 23, 1907, by making his children the beneficiaries therein, instead of his wife, who had died. Among other conditions set forth, both in the original and in the new certificate, were that the said member should comply with the constitution, laws, rules, and regulations then in force or that might thereafter be enacted "to govern said ruling and fund." The fund referred to was the mortuary fund of said society, out of which

said benefit certificate was payable. Beginning January 1, 1903, the plan was changed to monthly payments. As above stated, appellee's assessments from the date he joined to the date of his transfer were $3.30 each. From September, 1895, to December, 1902, they were $4.92 each. From January 1, 1903, to August, 1908, they were $7.35 per month. On September 1, 1908, they were raised to $23.16 per month. Appellee refused to pay this rate, and, electing to treat the same as a repudiation of the contract by appellant, he brought suit to recover back the amount of premiums paid by him, which amounted in the aggregate to $1,049.88.

The case was tried by the court without a jury, and judgment was rendered for appellee for [illegible] together with the further sum of $399.07, interest. From this judgment the appellant has appealed to this court, and the case is submitted upon numerous assignments of error filed herein by appellant.

1. Appellant filed eight assignments of error on the findings of fact by the court. Appellee objects to the consideration of these assignments for the reason that appellant did not except to the court's findings of fact. Appellant excepted to the judgment of the court, and has brought up the statement of facts as a part of the record herein. In such case it is not necessary that exceptions shall be taken to the findings of fact in order to assign error thereon. Voight v. Mackle, 71 Tex. 81, 8 S. W. 623; Tudor v. Hodges, 71 Tex. 395, 9 S. W. 443; Connellee v. Roberts, 1 Tex. Civ. App. 367, 23 S. W. 189; Wilkins v. Burns, 25 S. W. 432.

2. The first assignment of error is to the effect that the court erred in finding that the Fraternal Mystic Circle, the Ohio corporation, and the Supreme Ruling of the Fraternal Mystic Circle, were one and the same. We sustain this exception. They were organized under the laws of different states. Six of the incorporators of the Pennsylvania incorporation were not members of the Ohio incorporation, and each was carrying on business at the same time, from April 27th to June 5th. Change in membership is one of the tests as to whether or not a new corporaton is created. Wilhite v. Convent of G. S., 117 Ky. 251, 78 S. W. 139. The purchase of the property and franchise of one corporation by another does not constitute

a consolidation of such incorporations. Railway Co. v. Newell, 73 Tex. 334, 11 S. W. 342, 15 Am. St. Rep. 788. The intent of the parties is the test as to whether a charter merely amends the charter of the old corporation or creates a new one. 2 Clark & Marshall on Cor. pp. 974-976. It is probably true that but for the embarrassed condition of the Ohio order the Pennsylvania order would not have been organized, but this shows an intention to get rid of such embarrassments, which could not be done without organizing a new corporation. There is no question here of fraud on the rights of the members, nor evasion of any law of Ohio by resorting to the subterfuge of a new corporation. "When a corporation is embarrassed in its business, and a new corporation is formed by its members, or some of them, for the purpose of purchasing its assets and carrying on the business, it is clearly a new corporation." 2 Clark & Marshall on Cor. 972.

3. In view of the disposition which we make of this case, it is not necessary that we should pass on the second and thirteenth assignments of error.

4. As to the third assignment of error, the evidence shows that the appellee consented to a change from the assessment to the monthly payment plan by surrendering his old certificate and accepting a new one under the changed plan. We do not, however, hold that he, either personally or by payment of the premiums under previous changes of rates, accepted the rerating complained of in this suit. On the contrary, like Jerusha, he "kicked," though for a different reason, as he alleges. Whether or not, as a matter of law, he assented to the rate of which he herein complains, depends upon the authority of the association to make said rerating. Without here discussing the question of "vested rights" and "violation of contracts" hereinafter considered, we call attention to the fact, as having a material bearing upon the matters hereinafter discussed, that the position of a member of a beneficial fraternal association having a representative form of government is like to that of a citizen of the state under such form of government, wherein each is held to have been a party to the making of every law constitutionally enacted by the legislative body, and to have assented thereto, whether or not, as a matter of fact, he

voted for any representative, or whether the representative for whom he voted, voted for or against such law.

5. We approve of the findings of fact complained of in the fourth, fifth, and sixth assignments of error, but do not deem them material. We wish to say, however, that the finding complained of in the sixth assignment that the resolution of 1908, requiring members who were admitted prior to March 1, 1901, to be rerated as of their ages on January 1, 1908, applied only to those holding certificates on the combination plan. On ordinary life certificates the rerating was required as of their ages on January 1, 1903.

6. The seventh assignment complains of the following finding of fact: "I find that the effect of said resolution of the executive committee is to require members admitted prior to March 1, 1901, to pay more for their insurance than those members of the same age admitted after March 1, 1901." As it does not appear that any certificates were issued on the combination plan after March 1, 1901, there is nothing in the record from which a comparison as to such members can be instituted. As to ordinary life certificates, the resolution plainly says that the rate shall be fixed as of five years below their attained age on January 1, 1908, which would be January 1, 1903. This would be the same rate as those members of like age who joined on March 1, 1903. The second paragraph of the court's conclusions of law, complained of in the twelfth assignment, in so far as it is based on this erroneous finding of fact, need not be further referred to; said conclusion being: "The rating of members who joined prior to March 1, 1901, as of their ages on January 1, 1908, was an unreasonable and arbitrary discrimination against plaintiff, amounting to a repudiation of his contract." The issue as to the unreasonableness of such rerating is raised by the ninth, tenth, eleventh, fourteenth, and fifteenth assignment, and will be further discussed in this opinion.

7. Appellee contends that the change of rates was not legal for the reason that it was not made by the supreme legislative authority of the order, but by the executive committee. It is obvious that, independent of any other

consideration, a member can be bound only when the amendment or the new law is adopted in accordance with the law of the association. Ordinarily such change must be made by the supreme legislative body. Nevertheless, a law which is in the power of the board to pass will be binding to the same extent as a law passed by the supreme body. 1 Cooley, Ins. Briefs, pp. 704, 705; K. of P. v. Kutscher, 179 Ill. 340, 53 N. E. 620, 70 Am. St. Rep. 115. The rerating in this case was made by the executive committee. It was expressly authorized so to do by the constitution of July, 1907. The language of the constitution in this regard is as follows: "Whenever members taken over from another society are permitted to retain the benefit certificates issued to them * * * by the society of which they were formerly members; or, if the rate of assessment paid by any member is lower than the rate charged by the corresponding benefit plan of the Fraternal Mystic Circle, * * * the members may be rerated by the Supreme Executive Committee so that perfect equality shall be maintained between the members of the order." Appellee contends that this does not apply to him because, first, the Ohio and Pennsylvania societies were one and the same. We have already disposed of this contention; second, that the power to rerate was intended to be conferred only as to those who thereafter became members of the order. In construing legislative acts, we are to look to the evil supposed to exist, and the remedy sought to be applied. The supposed evil in this case was the inadequate rates theretofore paid by the members who had joined prior to March 1, 1901. The society had lost by such members $120,000. The remedy sought was to equalize their assessments with those who had joined subsequent to that date. Clearly said provision of the constitution was intended to authorize said committee to increase the rates of that class of the membership to which appellee belonged. If the contention of the appellee that this committee had no constitutional authority to change the rates could be sustained, it occurs to us that it would raise a very serious question as to his right to maintain this suit. The trial court held

in this case that the appellee had the right to maintain this suit upon the grounds that such rerating amounted to a repudiation of its contract by the appellant. But why should the appellant be held responsible for the unauthorized acts of this committee any more than that the state should be held responsible for the resolutions of a ward meeting suspending the writ of habeas corpus? If the executive officers of the order attempted to put in execution the unauthorized resolution, if it was unauthorized, why could they not be enjoined by appellee under our liberal practice in that regard? They could in such event by mandamus have been compelled to restore appellee to membership in said order. 4 Clark & Marshall on Ins. pp. 3433, 3435.

8. Before entering upon an examination of the facts upon which the court based its conclusion of law that the rerating of appellee was unnecessary, arbitrary and unreasonable, and therefore amounted to a repudiation of the contract by appellant, we will state the law as to the presumptions in this regard. The burden is on the appellee for the reason that, the rerating having been done by the society through its constituted authority, the presumption will be indulged that such rerating was necessary and equitable, until the contrary is shown. "These associations are self-governing bodies, and the courts are disinclined to interfere with or restrict their power to legislate for themselves" (Hall v. Travelers' Ass'n, 69 Neb. 601, 96 N. W. 170), "and will not do so, except upon most urgent reasons" (Stone v. A. O. U. W., 78 Mo. App. 546). "The supreme legislative body is vested with the power of determining when a change is demanded, and with their discretion courts cannot interfere, unless there is a clear, unreasonable, and arbitrary invasion of private rights." K. of P. v. Knight, 117 Ind. 495, 20 N. E. 483, 3 L. R. A. 409. See, also, Korn & Wise-Miller v. Assurance Society, 6 Cranch, 192, 3 L. Ed. 199.

9. The conclusion that said rerating was unnecessary is founded on the finding of fact complained of in the eighth assignment of error, as follows: "I find that in 1908 the defendant was in good financial condition, having about

$225,000 surplus assets over all liabilities, all of said assets being subject to the payment of death and other benefits." The facts show that appellant had paid all death claims and other benefits that had accrued, and had left in its treasury in 1908 $225,000 subject to the payment of such claims as there should thereafter accrue. But that appellant was therefore "in good financial condition," or that this sum was "surplus assets over all liabilities," is a non-sequitur—a fallacy that has proved the undoing of many life insurance companies, and especially fraternal associations. What are the assets of a life insurance company? The money which it has in its treasury and the money which it will hereafter be able to collect under its contracts with its policy holders, above its necessary expenses. What are its liabilities? The amounts unpaid on claims that have already accrued and the amounts which it has promised to pay by its contracts of insurance which will accrue in the future. If its assets exceed its liabilities as thus stated, it is in good financial condition; otherwise it is not. Many fraternal insurance orders honestly conducted have been lured to their destruction by this mirage apparent of accumulated surplus during the early period of their existence. Among institutions born of the wisdom, philanthropy, and altruism of modern times, none are more capable of or are accomplishing greater good than mutual fraternal benefit societies, and it is encouraging to see some of them awakening from this delusion to which too many of them have been given over. A mutual insurance association has no capital stock, and can pay its policy holders only out of the money paid in by them and the accumulated interest thereon. A statement of its affairs at an early period of its existence may show what is frequently called a surplus, when it is hopelessly insolvent in the sense that it cannot possibly meet its future obligations. Experience has demonstrated that the average life of a given number of men at a given age will be a certain number of years, called the "expectancy." Life insurance upon the level rate plan is based upon a mathematical calculation, showing that a given sum of money, paid

at given intervals, and made to earn a given per cent, will at the end of the period of expectancy amount to $1,000. If the amount of premiums paid is just enough to amount to $1,000, or a multiple thereof, if the policy be for a greater sum, plus the cost of running the business, the insured is getting his insurance at cost, and the association is solvent and will remain so as long as it is honestly conducted; but, if the rates are less than this, the association must ultimately fail, it matters not how much so called "surplus" it may have on hand at a given time. This apparent surplus arises from the fact that though the expectancy of a given number of men at a given age is so much, say 40 years, which is the expectancy at 27, it does not follow that one fortieth of them will die in one year. On the contrary, it will be a number of years before one-fortieth of them die; and consequently, though the premium charged should be only one-half of the necessary amount, the accumulations for several years would show a surplus in the sense that the society would have received more money than it had paid out, but, long before the period of expectancy was ended the association would be bankrupt. In 1907 this order had insured its members in the sum of $39,937,000. This was its liability. Its real assets were not the so-called $225,000 surplus in its treasury, but the amount that it would collect from its members in the future. Whether or not it was in good financial standing depended upon the adequacy of its rates, which it appears was not considered by the court.

10. It is well settled that associations such as appellant have an inherent right, subject to certain exceptions, to pass by-laws, rules, and regulations for their government, and that such action, when taken by the properly constituted authority, is binding on all the members, whether the same be taken before or after the acquisition of membership. Reynolds v. Royal Arcanum, 192 Mass. 150, 78 N. E. 129-133, 7 L. R. A. (N. S.) 1154; Fullenwider v. Royal League, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; K. of P. v. Knight, 117 Ind. 489, 20 N. E. 482, 3 L. R. A. 409; W. of W. v. Fraley, 94 Tex. 200, 59 S. W.

879, 51 L. R. A. 898; United Moderns v. Colligan, 34 Tex. Civ. App. 173, 77 S. W. 1032; Clark v. Mut. Fund, 14 App. D. C. 154, 43 L. R. A. 395; Supreme Commandery v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Daughtry v. K. of P., 48 La. Ann. 1203, 20 South, 712, 55 Am. St. Rep. 310; Dornes v. K. of P., 75 Miss. 466, 23 South. 191; Hughes v. Wis. Odd Fellows, 98 Wis. 292, 73 N. W. 1015; Byrne v. Casey, 70 Tex. 247, 8 S. W. 38; Splawn v. Chew, 60 Tex. 534; Pain v. Jean Baptiste, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Messer v. Grand Lodge, 180 Mass. 321, 62 N. E. 252; Wright v. Mut. Ins. Co., 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; Gaines v. Royal Arcanum (C. C.) 140 Fed. 978; Fugure v. Society St. Joseph, 46 Vt. 376; Haydel v. Mut. Res. Ass'n, 104 Fed. 718, 44 C. C. A. 169; Gaut v. Mut. Res. Ass'n (C. C.) 121 Fed. 403; Loeffler v. M. W. of A., 100 Wis. 79, 75 N. W. 1012; Lawson v. Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; Gilmore v. Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17. As to how far this right to amend extends, courts have drawn distinctions as to whether it is exercised under the general inherent right to amend or under a right expressly reserved in the charter or constitution and by-laws; or, in addition to this, under the contractual right reserved in the policy. In this case the appellee in his contract with the association accepted his certificate on condition that he should make punctual payment of all dues and assessments for which he might become liable, and that he should comply in the future with the rules and regulations "now governing the said ruling and fund, or that may hereafter be enacted by the Supreme Ruling, to govern said ruling and fund."

Appellee contends that the right as to future by-laws and regulations relates "only to business methods and the general duties of members, but not to anything which changes the contract or impairs vested rights," and quotes the summing of Mr. Cooley in support of his views. 1 Cooley, Ins. Briefs, 719. Admitting the correctness of Mr. Cooley's deductions, the question still remains: What are the contractual or vested rights of a member of such an

association? The apparent conflict in most of the cases can be reconciled by giving heed to the facts of the particular case. Some of them are cases of life insurance, wherein a different rule prevails from cases of mutual fraternal associations; the marked difference being that "in ordinary insurance the whole contract is contained in the policy, and no question can arise as to the rights of the insurer to modify the contract without the consent of the insured. When the insurer is a mutual benefit association, however, the relation between the parties is materially different and of a twofold aspect. Here is the relation between the association and the member as such, and the relation between the association as an insurer and the member as the insured. The contract between the association and the member is, moreover, contained, not only in the certificate issued to the member, but, as has been seen, also in the constitution and by-laws of the association. 1 Cooley's Ins. Briefs, 703. It involves also the relation of the member as an insurer to the other members as the insured. Some of the cases are where the right of amendment arises under the inherent right of such associations to amend their by-laws, and others were under the contractual right to amend. In the latter case we must look to the terms of the right of amendment reserved in the contract in determining its extent. In Morton v. Supreme Council, 100 Mo. App. 91, 73 S. W. 264, relied upon by appellee, we are admonished that in cases of this kind "the language of the certificate ought to be attentively noticed in order to ascertain the exact scope of the stipulations, and to see how pertinent the opinion is to the particular case in which it is cited," an admonition which we would do well to heed.

Reverting to the above quotation from Mr. Cooley, let us first inquire what is the contract between the association as such and the member as the insured. It is that the association will pay to the beneficiary of the insured an amount of money fixed and agreed upon in the certificate. This contract is placed by the courts upon the same footing as that of an ordinary policy; that is, it cannot be changed without the ex-

press consent of the insured. Of this nature were the leading cases relied upon by appellee. These are the cases where the rights of the insured are termed "vested rights," a denial of which is termed a "violation of the contract." In the Morton Case, supra, the court said that the agreement to be governed by subsequently enacted by-laws could not interfere with the essential purpose of the contract, "namely, the indemnity covenanted to be paid." In the case of A. L. of H. v. Batte, 34 Tex. Civ. App. 456, 79 S. W. 629, the association undertook by a by-law to reduce the certificate from $5,000 to $2,000. The following cases were also upon the issue as to the right of the association to arbitrarily reduce the amount of the certificate or to change the terms of payment, without the consent of the insured, by by-laws passed subsequently to issuance of the certificate: Jarman v. K., T. & M. (C. C.) 95 Fed. 75; Lippincott v. A. L. of H. (C. C.) 130 Fed. 483; McAlarney v. A. L. of H. (C. C.) 131 Fed. 538; A. L. of H. v. Jordan, 117 Ga. 808, 45 S. E. 33; Russ v. A. L. of H., 110 La. 588, 34 South. 697, 98 Am. St. Rep. 469; Newhall v. A. L. of H., 181 Mass. 111, 63 N. E. 1; O'Neil v. A. L. of H., 70 N. J. Law, 410, 57 Atl. 463; Langan v. A. L. of H., 174 N. Y. 266, 66 N. E. 932; Beach v. Maccabees, 177 N. Y. 100, 69 N. E. 281; Hale v. Equit. Aid. U., 168 Pa. 377, 31 Atl. 1066.

As the insured, the member has the right to demand that the association pay the beneficiaries named in his certificate the amount therein specified, and, in consenting to be governed by the by-laws of the association which might thereafter be enacted, it is not presumed that he intended to agree that the association might in this manner relieve itself of the obligation to pay as it had contracted to do. But, "as the promise to pay the beneficiary is binding upon the association, it ought to make adequate provision to obtain the means of payment." Newhall v. A. L. of H., supra. And, as the members are the association in this sense, they ought to be bound by their agreement to allow such changes to be made in the by-laws as shall be found necessary to make such provision. As the insurer, he contracts that the certificates of all the other members shall be paid, and agrees in advance to such

changes in the by-laws as are necessary to meet such payments, such payments as he knew at the time he joined could be met only by the assessment of adequate rates upon himself and all other members. It is admitted by appellee in the brief filed by his able attorneys herein that a subsequent by-law is binding in so far as it relates "to the business methods of the association." It occurs to us that the most important "business method" with which such an association could be called upon to deal is fixing the proper rates of assessments, so as to be able to meet its obligations, and in so adjusting these rates, according to age, as to make them equitable as between all of its members. Where an association has fixed its rates too low, such a readjustment as experience shall show to be necessary must be held to be in contemplation of each member when he joined, and thereby became the insurer of his fellow members, knowing, as he must be held to have known, that he could not carry out his part of the contract with his fellow members, and that they could not carry out their contract with him without such readjustment of rates, if the same became necessary. The right of a mutual fraternal association to increase its rates of assessment when the same becomes necessary to preserve its existence, may be likened to the law of self-defense, which Blackstone says may justly be called the primary law of nature, and which, we will add, may be exercised by corporations as well as individuals, especially when they have stipulated in the contract the right so to do. Not only did the appellee agree to be bound by by-laws subsequently passed, which as contended for in some cases might be construed to relate only to the social relations of the members, but specifically by such by-laws governing the fund of the association. The suicide cases, which, in a sense, are in a class to themselves, rest for the most part on the fundamental principle that the insurer cannot relieve itself of its obligation to pay by inserting a condition not originally contained in the certificate. Some of them have added the proposition that a provision against suicide, when committed in a state of insanity, is not binding, because the act of an insane man is not his act.

11. Where the right to change the by-laws of a fraternal

beneficial society is reserved in the contract, the association has the right to make such changes, even thogh they "affect the contract." 1 Cooley's Ins. Br. p. 217. A member of such association has no vested right to have his fellow members continue to carry his insurance at a loss to them while he refuses to bear his part of the burden in making preparation to pay their policies on maturity. The cases wherein it has been held that changes in the by-laws are not binding are where an attempt has been made to divert the funds from their original purpose; where the assessment was clearly unnecessary and unreasonable; where it was arbitrary and unjust as to a particular class of members; where forfeiture has been attempted without notice; where an attempt has been made to reduce the amount of the certificate without the consent of the insured, or where the purpose is to avoid payment altogether, as in suicide cases. "There being a power of amendment reserved in the contract between the plaintiff and the society, it was liable to changes as to future beriefits to which a disabled member might be entitled. * * * Such a change is not a repudiation of the terms of the contract, but, on the contrary, is in accordance with them." Pain v. Société Jean Baptiste, supra. "Plaintiffs rely upon the provision for the payment of a fixed rate in the by-laws originally adopted. The change in the mode of making assessments is simply a detail in the management of the business of the order, which the lodge might any time permit to be changed." Messer v. Grand Lodge U. W., supra. In the case of Ebert v. Mut. R. A., 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457, cited by appellee, the court held that the association had the right to change the rate of assessment, provided such change was reasonable. In Strauss v. Mut. R. A., 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699, the policy provided that the assessments should be apportioned according to age. The court held in that case that the rerating did not comply with this part of the contract. This case is cited by appellant, as is also the case of Hogan v. Pac. E. L., 99 Cal. 248, 33 Pac. 924. In the latter case the court said: "We do not decide that a member of a purely mutual insurance company is not bound by all reasonable laws and changes

made thereunder." The court in effect held that the defendant in that case was a swindling scheme, "brought into existence for the benefit of the promoters." It is true there has been some diversity of opinion as to what changes as a matter of law may be made by subsequently enacted by-laws; but the courts of this state are in line with other jurisdictions, where such power has been liberally construed. In Eversberg v. Maccabees, 33 Tex. Civ. App. 553, 77 S. W. 248, Justice Pleasants says: "We think the contention that the suicide amendment cannot be applied to the certificate sued on, because to so apply it would impair vested rights, is without merit. When the holder of the certificate became a member of the order, he expressly agreed that he would be bound by the by-laws then in force, or that might thereafter be adopted. He thus recognized the right of the order to change its by-laws and consented in advance to be bound by any change that might be made. That such an agreement is binding and valid seems to be settled by the great weight of authorities"—citing Supreme Lodge v. Trebbe, 179 Ill. 348, 53 N. E. 730, 70 Am. St. Rep. 120; Supreme Commandery v. Ainsworth, 71 Ala. 436, 46 Am. Rep. 332; Supreme Lodge v. Knight, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Hughes v. Wisconsin Odd Fellows, 98 Wis. 292, 73 N. W. 1015; Dornes v. Supreme Lodge, 75 Miss. 466, 23 South. 191; Daughtry v. K. of P., 48 La. Ann. 1203, 20 South. 712, 55 Am. St. Rep. 310. The following excerpt from the Hughes Case, supra, is quoted with approval: "The subsequent by-laws relied on by the company to defeat a recovery may fairly be said to have been consented to by the insured. * * * So far from being violative of the provisions of the contract, it is in accorance therewith, and with the consent of the assured contained in his application. * * * We think that the insured might and did contract with the defendant company to be bound and affected in reference to by-laws and regulations of future enactment as fully and effectually as if such laws and regulations were existing at the time he became a member, and might consent that they should enter into and form parts of the contract modifying or varying the rights of the parties." Among the cases cited, supra, is

the case of Daughtry v. K. of P., in which this language is used: "The vested right that the deceased had was for his family to recover $3,000, provided he complied with the laws of the order." The Daughtry, Ainsworth, Dornes, Hughes, and Trebbe Cases, supra, were suicide cases. See, also, Bollman v. K. of H., 53 S. W. 722.

12. We now come to the discussion of the question: Was the change of rates as to the appellee arbitrary, unnecessary or unreasonable? We think it was necessary for the reasons herein set out. All of appellee's class —that is to say, all who were like him, had joined the order prior to March 1, 1901— were affected alike by the change, and in this sense it was not arbitrary. Was an arbitrary line of demarkation drawn between those who had joined before March 1st, and those who had joined since March 1, 1901? On the contrary, the line which had theretofore been drawn by requiring all who had joined after March 1, 1901, to pay fraternal congress rates, while those who had joined before that time were allowed equal benefits by paying a different and lower rate, was an arbitrary and unjust line, which the rerating wiped out by causing all to pay the same rate. Was the rerating unreasonable? The uncontroverted facts show that appellee and all members similarly situated had been getting their insurance below what it cost the association to carry them. The membership of the Circle, to whose contributions alone appellee looked for the payment of his certificate under his original contract, had incurred losses up to 1907 in excess of its contributions of $68,651.23. Its excesses of liabilities by reason of death and benefit claims over its assessments paid for the year 1907, amounted to $33,156.27, and this notwithstanding the appellee's assessments and others of his class had been increased from $3.30 in 1893 to $4.92 in 1895, and to $7.35 in 1903, all of which had paid up to and including the year 1907. Where would the Circle have been had the society not violated (?) its contract by raising the assessments? Even then it could not have met the demands had it not abolished the Circle plan and paid all losses out of the general fund, which it had been able to do by reason of the rates charged those who had joined since March, 1901, and by

reason of the further fact that those joining subsequent to that time were "fresh blood" in the terminology of fraternal associations.

In the case of Strauss v. M. R. Ass'n, supra, the court refers feelingly to the "old members who have borne the heat and burdens of the day" being crowded out by the new members. This case shows that, by reason of the well-known law that but comparatively few adults die young, these old members were enabled to carry on the organization at an inadequate rate for some years, since which time it has been kept alive by the contributions of the new members assessed at a higher rate. It is true that the purpose of fraternal associations is to "bear one another's burdens" by paying the excesses of the policies of those who die early, over their contributions, out of the contributions of those who live long; but, if such an association is not to be doomed to inevitable failure, the rates must be based upon the cost of carrying the insurance. If the rates are equitable, they must be based upon the expectancy of each member at the date he joins, and thus each member should "bear his own burden." All the contributions made prior to March 1, 1903, having been exhausted, it was proper that he be treated as joining at that time. In another case it is said that to rerate the old members would be to deny them the "invigorating effects of new blood." If the new members are paying no more than enough to meet the demands that will ultimately be made on the association by reason of the certificates issued to them, their membership can have no ultimate invigorating effect upon the society. If they are required to pay more than the cost of their insurance, the excess is "blood money." The theory that a mutual association can afford to carry its members at less than cost on account of its increasing membership is as fallacious as that of the merchant who said he could afford to sell goods at less than cost because he sold so many of them. An insurance association that conducts its business on the level rate plan, as does the appellant, must charge such a rate as that the premiums for the period of the insured's expectancy, with reasonable interest, will equal the amount contracted to be paid, plus the necessary expense of carrying on the business.

If the rate previously paid by appellee was less than this, there was a necessity for rerating him, and, if his premiums under the rerating are not in excess of this, his rerating is reasonable. The amount accumulated from the premiums paid and the interest thereon, which is the fund out of which the policy must be paid, is called the reserve. This reserve should begin to accumulate during the first year of the life of the policy, and the amount that it should be at any given time thereafter can be calculated with absolute certainty. The testimony in this case shows that to meet the cost of appellee's insurance, his reserve on August 31, 1908, should have been $1,800. Instead of this being the case, he had no reserve, but a deficiency of $24.50.

By bringing this suit, appellee, in effect, said to appellant: "I joined your association because the rates were low. You now say that it is necessary, in order to pay my policy, that my rates be increased. I do not want a policy at the increased rates. Pay my money back, and I will relieve you from your obligation to pay my policy at my death." Without further investigation, this looks fair. But appellant by defending this suit says: "I haven't any of your money. You have paid a total of $1,049.88. $119.31 of this has been consumed in conducting this business for you and your fellow members, leaving your net contribution to the mortuary fund $930.87. We held this money in trust for you to be paid to your fellow members as they should die from time to time, in accordance with your contract as one of the insurers in this association. We have paid out for you on these demands $954.57, which has consumed all the money paid in by you and $24.50 in excess thereof, paid by us from premiums paid by those who have joined since March 1, 1901. You can withdraw from the association, if you wish, but, if you remain a member, you must pay in the future as of your age on March 1, 1903." "But," replies appellee as his final argument in the case, "if I should admit your right to rerate me as of my age at that date, your rate of $23.16 per month, or $277.92 per annum is unnecessary and unreasonable." This is the proper rate for the combination plan of certificate held by appellee, as shown by the Fraternal Congress rates. Ap-

pellant's actuary testified to the correctness of this rate, and no actuary of any other company, nor any other witness, was called to dispute this testimony. But appellee "figures" it in this way: If he continues to pay his rerating of $277.92 per annum for the remainder of his expectancy, it will amount to $3,335.04, to which, add $1,049.88 already paid by him, would make the cost of his $3,000 policy $4,384.92. A correct calculation, based on his expectancy of 10.1 years at 68, would make the amount $3,856.88. But the vice in this calculation is that it makes no allowance for the other benefits under the combination plan, but assumes that the payment of his life policy at maturity is all the benefits that will accrue under appellee's certificate. Appellee points out that the rate charged him under the rerating is even more than that charged by old line insurance. This would be true if appellee's policy was an ordinary life policy. The rate in old-line companies for 63, appellee's age March 1, 1903, is $87.81 per thousand, or $263.43 on $3,000, as against $277.92 fixed by appellant in rerating him. But he was given the option of accepting a straight life certificate at the rate of $15.69 per month, or $188.28 per annum, which for the period of his expectancy would amount to $1,901.62, added to the $1,049.88 previously paid by him, would show that his $3,000 certificate would cost $2,951.50. "Not much as an investment." No; life insurance is not an investment. It is security against the uncertainty of life. If all persons knew they would live out their expectancy, nobody would take life insurance. While the law of averages makes the expectancy certain for the company, it is very uncertain for the individual. Had the appellee paid his first increased assessment of $23.16, and died before the month was out, such payment would not have been a bad investment.

We conclude that under appellee's contract to be bound by the future by-laws and regulations of the association, both as to its ruling and fund, the appellant had the right to rerate appellee's premiums, whenever the same became necessary; that a necessity had arisen when the rerating herein was made; that said rerating was made in a constitutional manner; that said rerating, as applied to appellee, was not unreasonable.

nor arbitrary, for all of which reasons we hold that said rerating was not violative of the contract of insurance, and did not invade any vested right of appellee.

There being no controversy as to the facts in this case, the judgment of the trial court is here reversed and judgment is rendered for appellant.

Reversed and rendered.

On Rehearing.

In view of the importance of this case to all fraternal beneficial societies in this state, and to their numerous members, and of the statements made by appellee in his motion for rehearing, based, as we think, upon a misconception of the facts, and of his earnest insistence that we are in error, as well as in view of some of the late New York decisions, we deem it proper to more clearly state some of said facts as shown by the record, and to review said cases, to the end that our opinion as hereinbefore rendered may not be misunderstood.

It is insisted that the rerating of appellee and others in 1908, who joined prior to March 1, 1901, as of their ages in 1908, and not rerating others who joined subsequent to March, 1901, is an arbitrary distinction, made to the detriment of appellee. We do not so understand the facts. As shown by the record, appellee joined in 1893. From that time to January 1, 1903, his assessments were from $3.30 to $4.92 per month, a sum wholly inadequate to pay the cost of carrying his insurance. March 1, 1901, appellant adopted for all new members the Fraternal Congress rates. January 1, 1903, the appellant rerated all old members on Fraternal Congress rates, but required them to pay such rates as of the age of their admission, instead as of their then age as it should have done, for the reason that the amounts that they had theretofore paid had been entirely consumed, and it would necessarily cost as much to carry them in the future as it would to carry new members. Under this rerating appellee's assessments were increased to $7.35, which he continued to pay until 1908. In 1908 the members joining prior to March, 1901, were rerated as of their then ages. Thus appellee had been carried from 1903 to 1908 as of his age when he joined, to wit, 48, instead of 58, as he should have

been, and in 1908 he is permitted to continue his membership by paying as of 63, his then age. Appellee in his attempt to demonstrate that injustice has been done him says: "Plaintiff Ericson is 63 years old in 1908, and he joined the order prior to March, 1901. He is requested to pay on the basis of 63 years of age $277.92 for $3,000 insurance under such plan. Then take, for instance, a man of the same age in 1908 who joined the order in 1903. He is required to pay on a basis of 58 years of age, or $187.25 per year for the same amount of insurance, a difference of $90.64 in favor of the member joining after March, 1901." The fallacy of this is that it ignores the fact that the member who joined in 1903 began then to pay $187.25 per annum for his insurance, while appellee for five years, to wit, from 1893 to 1898, had paid only $88.20 per annum ($7.35 per month) for the same amount of insurance, a difference of $99.05 in favor of appellee. The member who joined in 1903 had created a reserve which enabled the order to carry him as of the age of 58. Appellee had created no reserve, and consequently the order could carry him only as of his then age, 63 years. He was given the privilege of continuing his insurance as of the age attained by him without re-examination and without making up the deficit already incurred on his behalf, and we cannot see that he has any legal cause of complaint. We cannot agree with the contention of appellee that the inability of appellant to meet its obligations without raising the rates is a mere contingency which may or may not happen some time in the future. Its policies are liabilities already incurred, and must be met as surely as it is appointed unto all men to die, and after death the payment of the policies. At least, the charge having been made by the duly constituted authority of the order, and the evidence clearly showing that appellee has hitherto been carried at a loss, the presumption will be indulged, in the absence of evidence to the contrary, that it was necessary to rerate appellee, and all who joined prior to 1901, as of their ages at the time of such rerating, to wit, 1908.

In the case of Dowdall v. Mut. Ben. Ass'n, 196 N. Y. 405, 89 N. E. 1075, cited by appellee, the single issue is presented as to whether or not the association, under the general power

of a corporation to amend its by-laws, had the right by such amendment to raise the rate of assessment of one of its members to his then attained age, the constitution at the time he joined providing that all members should be assessed as of their age when admitted. The power was denied in that case. The court said: "There is a conflict of judicial decisions in the various states. * * * It would be impossible to harmonize the conflicting views of the learned judges." We are not called upon to do so in this case nor to choose between them, as the contract herein expressly provides that appellee should comply with the rules and regulations that might thereafter be enacted to govern the association and its fund. The right to make such amendment where the same is provided for in the contract is recognized in the Dowdall Case in the following language: "It is quite easy for fraternal organizations, if they deem the provisions for the benefit of their members tentative only, and desire to have them subject to modific action as the business of the order may require, to express that in the certificate." We do not approve of the restricted construction given to such reserved right by some of the New York courts, particularly in the case of Green v. Royal Arcanum (decided July 14, 1910) 124 N. Y. Supp. 398, but choose rather to follow in this regard the views of the New York court in Mock v. Supreme Council, 121 App. Div. 474, 106 N. Y. Supp. 155, wherein it is held that, because of the peculiar relation of the members of these associations, the fact that they were insurers, as well as insured, the individual must have understood that the changed conditions might bring about the necessity for increased assessments. In the case of Wright v. Maccabees, 196 N. Y. 391, 89 N. E. 1078, an effort was made to reduce the amount of the insurance. In the case of Rockwell v. Mut. Aid Association, the appellee was an old line insurance company, 134 App. Div. 736, 119 N. Y. Supp. 515. We might say in this case, as was said in the Green Case, supra: "The appellee's contention is from some points of view academic, because the right of appellant to increase the number of the assessments, instead of increasing the amount of each assessment, does not appear to be disputed;"

but we prefer to rest our decision upon the ground that the change in the rates is permissible under the contract between the parties herein.

Motion for rehearing overruled.

DOWDALL v. SUPREME COUNCIL OF CATHOLIC MUT. BEN. ASS'N.

Court of Appeals of New York. Nov. 23, 1909. 196 N. Y. 405.

Change of Rate of Assessments.

Edward T. Bartlett, J. The defendant was incorporated on the 9th day of June, 1879, under chapter 496, p. 541, of the Laws of that year entitled "An act to incorporate the Supreme Council of the Catholic Mutual Benefit Association." On the 9th day of July, 1879, a branch of the defendant was organized at Avon, N. Y. The plaintiff became a member of the defendant on or about July 9, 1879, and was thereafter assessed at the rate of $1.10 for each assessment until January 1, 1904. When he became a member of the defendant, the number of assessments that could be made was unlimited. Since January 1, 1904, the plaintiff has been assessed at the rate of $5.56 for each assessment. It was admitted on the trial, which took place on the 12th day of June, 1906, that the plaintiff was 74 years of age on the 20th day of June, 1905, and that he had paid his dues or assessments up to the date of the trial. When the plaintiff became a member of the defendant there was issued to him a certificate which stated in substance, that he was to participate, in case of death, in the amount of $2,000 in the beneficiary fund. It also contained the following provision: "This certificate is issued upon the express condition that the said Michael Dowdall shall, in every particular while a member of said association, comply with all the laws, rules, and requirements thereof." On July 2, 1883, the defendant issued and delivered to the plaintiff the certificate of membership contained in the findings and which

he now holds. It was conceded on the argument that this certificate was precisely like the original, except a slight verbal change as to the name of the council issuing the same; the first certificate was headed "Grand Council," the second "Supreme Council."

The single question is now presented whether by amendment of the constitution, or any of the rules or regulations, made after the plaintiff had entered into his contract of insurance, it is possible for the defendant to change the rates of a single assessment from $1.10 to $5.56. The trial judge was of the opinion that no such change could be made under a fair construction of the contract entered into by the parties and decided in favor of the plaintiff. The learned Appellate Division reversed the judgment entered upon this decision, writing no opinion, but stated in the order of reversal that it was upon the authority of Mock v. Supreme Council of the Royal Arcanum, 121 App. Div. 474, 106 N. Y. Supp. 155, and Wright v. Knights of the Maccabees of the World, 122 App. Div. 904, 106 N. Y. Supp. 1150. There is a conflict of judicial decisions in the various states on the point now presented, but a careful examination of the cases shows that the great weight of authority is in favor of the position that the original contract cannot be impaired. It would be quite impossible to harmonize the conflicting views of the learned judges, and it remains to be considered whether the decisions of this court have not laid down the rule of law which must now govern, to the effect that the contract of insurance cannot be changed by any act of the defendant. We have on the one hand the plaintiff standing upon the plain letter and spirit of his contract, and on the other the insistence of the defendant that unless, under its construction of the contract, it is vested with the power to increase the amount of a single assessment, as the exigencies of the company may require, it will be unable to continue its financial life and pay its death losses.

The precise question now presented may be thus stated: The plaintiff received from the defendant a certificate insuring his life for $2,000, which contained a single covenant, as follows: "This certificate is issued upon the express con-

dition that the said Michael Dowdall shall, in every particular while a member of said association, comply with the laws, rules, and requirements thereof." The defendant also delivered to the plaintiff a printed book or pamphlet containing the constitution and by-laws of the association. Section 6 of article 3 of the constitution provided, in substance, that all members should be assessed according to their age when admitted. The defendant asked the trial court to find that said section 6 of article 3 so appearing in the printed constitution had not been adopted, nor had it been approved by the Supreme Council, and its publication in said pamphlet was unauthorized. This request was very properly refused in view of the fact that some thousands of the pamphlets had been sent to members. The plaintiff insists that the covenant contained in the certificate issued to him by the defendant, requiring that he should in every particular comply with all the laws, rules, and requirements of the association, refers only to such laws, rules, and requirements as existed at the time he entered into his contract; that any future changes or alterations made therein or additions thereto, seeking to modify or alter said contract in any respect, do not bind him.

The following cases lay down the legal principles which must control the decision in the case at bar: In Weber v. Supreme Tent of the Knights of Maccabees of the World, 172 N. Y. 490, 494, 65 N. E. 258, 259, 92 Am. St. Rep. 753, an action was brought upon a certificate of insurance. The defense interposed was that the insured took his own life, and hence a recovery could not be had, because, at the time of his death, the by-laws and rules of the order provided that should an insured commit suicide within five years from the time of admission into the order, whether sane or insane, the contract should be void. Weber's contract of insurance provided that it should be void if the insured committed suicide within one year whether sane or insane. During Weber's lifetime, after the issuance of the certificate, the defendant amended its by-laws and rules so as to extend the time from one year to five in the suicide clause. The opinion of the court near the close states: "This contract insured Weber against unintentional self-destruction after one year.

and defendant had not the power to take away the right thus secured without his consent." In Beach v. Supreme Tent of the Knights of the Maccabees of the World, 177 N. Y. 100, 105, 69 N. E. 281, 283, this court again examined the question as to the power of insurance associations or corporations to alter the contract of insurance by amendments in the constitution and by-laws made after the certificate was issued. Cullen, J., after the examination of the facts and authorities in that case, stated in closing his opinion as follows: "It is quite easy for fraternal organizations such as the defendant, if they deem the provisions for benefits to their members tentative only, and desire to have them subject to such modification as the business of the order may require, to express that in the certificate. So, in the present case, if the certificate had provided that the payments therein specified should be subject to such modification as to amount, terms, and conditions of payment and contingencies in which the same were payable as the endowment laws of the order from time to time might provide, the amendments would be applicable to existing members. But I think that nothing less explicit than this appearing in the certificate itself should be effectual for such a purpose. Fairness to persons joining the order required such plain dealing."

In Evans v. Southern Tier Masonic Relief Association, 182 N. Y. 453, 75 N. E. 317, it was held that the beneficiary named in a certificate issued by a fraternal benefit or life insurance association to a deceased member thereof, upon which all dues and assessments, required by the by-laws of the association, have been paid, cannot be deprived of the benefit specified in the certificate by amendments to the by-laws adopted subsequent to the issuance of the certificate, notwithstanding the application for membership, upon which the certificate was issued, contained a clause by which the applicant agreed to conform in all respects to the by-laws, rules, and regulations of the association then in force, or which might thereafter be adopted by its board of directors. The fact that the certificate of incorporation of the association contains a clause to the effect that the payment to the beneficiaries under the certificates of the association shall be "of

such sum as the by-laws of such association may from time to time prescribe," does not distinguish the present case from the rule. In this case it was held that Beach v. Supreme Tent of the Knights of the Maccabees of the World, 177 N. Y. 100, 69 N. E. 281, was a controlling authority.

A recent decision of this court is Ayers v. Order of United Workmen, 188 N. Y. 280, 80 N. E. 1020. In March, 1885, one Emory D. Fuller became a member of a local lodge of the defendant, a domestic corporation, and was to participate in the beneficiary fund of the order in the amount of $2,000 at the time of his death. The insured agreed to comply with all the laws, rules, and requirements of the order. In his application for membership the insured agreed "to strictly comply with the constitution, laws, and regulations which are, or may hereafter be, enacted by the supreme, grand, or subordinate lodge." Some time between 1898 and 1902 the defendant adopted a by-law which provided, in substance, that any member who should thereafter enter into the business or occupation of selling by retail intoxicating liquors as a beverage should be suspended from any and all rights to participate in the beneficiary fund. Previous to January 1, 1904, the insured had never engaged in the business of selling liquors, but on that day, in connection with one Hanchett, his copartner, he began to carry on a hotel at Weedsport. The firm employed a bartender, who sold liquor in the usual way over the bar. In June of the same year the insured died and the defendant refused to pay on the ground that he had engaged in the business of selling intoxicating liquors at retail. The contract of insurance had been in force for more than 12 years at the time of the amendment of the by-laws as to the sale of intoxicating liquors. The defendant having refused to pay the amount alleged to be due on the certificate, and action was brought to recover the same. The trial court and the Appellate Division decided in favor of the plaintiff, and this court affirmed the judgment. Vann, J., writing, stated: "This case cannot be distinguished in principle from a long line of cases decided by this court" (citing them). He referred, among others to the Weber, Beach, and Evans Cases already cited, and proceeded: "It is well established

by these authorities 'that a general power reserved either by statute or by the constitution of a society to amend its by-laws does not authorize an amendment impairing the vested rights of members.' An amendment of by-laws which form part of a contract is an amendment of the contract itself, and when such a power is reserved in general terms the parties do not mean, as the courts hold, that the contract is subject to change in any essential particular at the election of the one in whose favor the reservation is made. It would be not reasonable and hence not within their contemplation, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make a radical change in the contract, or one that would reduce its pecuniary value to the other. A contract which authorizes one party to change it in any respect that he chooses would in effect be binding upon the other party only and would leave him at the mercy of the former, and we have said that human language is not strong enough to place a person in that situation. Industrial & General Trust, Limited, v. Tod, 180 N. Y. 215, 225, 73 N. E. 7. While the defendant may doubtless so amend its by-laws, for instance, as to make reasonable changes in the methods of administration, the manner of conducting its business, and the like, no change can be made which will deprive a member of a substantial right conferred expressly or impliedly by the contract itself. That is beyond the power of the Legislature as well as the association, for the obligation of every contract is protected from state interference by the federal Constitution. Article 1, § 10.

* * * The reservation of a general power to amend the by-laws, without reserving the specific right to so amend them as to restrict the occupation, did not permit an amendment in that respect, and the attempt made without the consent of the assured was beyond the power of the defendant and absolutely void as to him. The effort was not to reduce the amount of insurance, but to destroy it altogether, unless the assured would conform to a by-law passed in violation of a vested right, for the privilege, allowed because not forbidden, of engaging in any lawful business was a vested right." Pages 285, 286, 287, of 188 N. Y., page 1021 of 80 N. E. See, also,

Wright v. Knights of the Maccabees of the World (decided herewith), 89 N. E. 1078.

The case at bar is well within the principles of the cases cited, and much stronger in favor of the plaintiff than the Evans and Ayers Cases, supra. In the Evans Case the application for membership, upon which the certificate was issued, contained a clause by which the applicant agreed to conform in all respects to the by-laws, rules, and regulations of the association then in force, and which might thereafter be adopted by the board of directors. In the Ayers Case the applicant agreed in his application for membership, "to strictly comply with the constitution, laws, and regulations which are or may hereafter be enacted by the supreme, grand, and subordinate lodge." In the case at bar the covenant in the certificate of insurance, as already pointed out, reads: "This certificate is issued upon the express condition that the said Michael Dowdall shall, in every particular while a member of said association, comply with all the laws, rules, and requirements thereof." There is no suggestion that the laws, rules, and requirements could at any future time be amended, or new ones enacted, so as to affect the contract. It is clear that, following the law as laid down by this court in the cases cited, the judgment appealed from must be reversed.

Referring to the statement of defendant's counsel that unless it is vested with the power to increase the amount of a single assessment, as the exigencies of the situation may require, it will be unable to continue its financial life and pay its death losses, there are two answers to this suggestion. This court said, under a different state of facts, in Vought v. Eastern Building & Loan Association, 172 N. Y. 508, 518, 65 N. E. 496, 499, 92 Am. St. Rep. 761: "It is contended that if the construction we have given this contract is to prevail, it will affect the responsibility of the defendant, if it does not result in its bankruptcy. If that be true, yet it affords no proper reason why we should disregard the plain and unqualified terms and provisions of the contract. Nor does it furnish any excuse for us to disregard well established principles of law to hold it unenforceable."

A further and persuasive answer is that plaintiff's coun-

sel, without objection, read from the report of the supreme medical examiner of the defendant, made to the convention of the supreme council of the defendant held at Buffalo, October 9 to 11, 1900, as follows: "We have too many deaths among new members. Of the 1,394 deaths during this term 76 died before they were members one year, and 140 more before the end of their second year, making 207, or 14.84 per cent of all our deaths among those who were members less than two years. This cannot be entirely due to accident, and certainly should not be. Many of those men must have been afflicted with some form of organic disease at the time they were examined for admission, but which they managed to conceal in some way from the local examiner, who sometimes through lack of time or his desire to increase our membership or to see the family of a friend provided for, becomes careless in making his examination, but very careful in filling out his reports to see that all the questions are favorable to the defendant and would necessarily be approved by the supervising medical examiner."

And plaintiff's counsel also read from the report of the supreme recorder to the same convention, as follows: "Another word in regard to the deaths of this term: Reference to the report will show that of the deaths of the past three years, 37 occurred within six months of initiation, costing $68,000; 97 occurred within one year of initiation, costing $167,000; 209 occurred within two years of initiation, costing $365,000; 283 occurred within three years of initiation, costing $485,000. Here it will be seen we have paid nearly half a million dollars for members whose average duration of membership will not exceed twenty-two months." This very severe arraignment of the business methods of the defendant, coming as it does from its officials in high position, goes far to establish the fact that the peril of coming insolvency is due to a failure to observe the fundamental principles of life insurance.

The judgment and order of the Appellate Division should be reversed and the judgment of the Special Term affirmed, with costs to the plaintiff in both courts.

MATHIEU v. MATHIEU.

Court of Appeals of Maryland. Feb. 25, 1910. 112 Md. 625. 77 Atl. 112.

Amendment to By-Laws.

Schmucker, J. This is an appeal from a final decree of circuit court No. 2 of Baltimore City, in an interpleader case, disposing of the proceeds of a membership certificate in a mutual benefit association.

It appears from the record that on June 13, 1897, Harry C. Mathieu, late of Baltimore City, became a member of the order of the Knights of Columbus, which is conceded to be a mutual benefit association. In exercise of the privilege accorded to members by the by-laws of the association at that time in force, he, being then unmarried, designated his mother, Mary A. Mathieu, as his beneficiary and the usual benefit certificate was issued to him bearing her name as beneficiary. On June 14, 1899, Mathieu was married to Elizabeth Deupert, and on September 27, 1908, he died, leaving her surviving as his widow. He never changed the designation of his beneficiary, and the certificate remained in his possession until his death.

On August 9, 1907, the association, in pursuance of an amendment to its charter made June 27, 1907, by a statute of the state of Connecticut, the place of its incorporation, adopted certain new by-laws of which section 4 is as follows: "When an unmarried man or widower names or designates as his beneficiary or beneficiaries a person or persons other than his own children, or one or more of them, and subsequently marries, the subsequent marriage of such member will have the effect of rendering such designation void. But it shall be lawful for such member to redesignate the same beneficiary or beneficiaries. Should such member die without making a new designation or redesignation then the benefit shall be paid in accordance with the classification in section 2, and in the order of precedence therein set forth."

Section 2 provided that upon the death of a member, if he

had failed to designate a beneficiary or the person designated had died, or if the designation should fail "for illegality or otherwise," the benefit should be paid "to the person or persons in the following classifications and in the order of precedence as herein set forth: *First, to the member's wife,*" second to his children, etc., etc.

Upon the death of Mathieu, the association being unable to determine whether his wife or his mother was entitled to the benefits, amounting to $1,000, due under the certificate, instituted the present interpleader suit against them and paid the money into court. The defendants having duly interpleaded and the case having come regularly to a hearing, the court below passed a decree awarding the money, less the costs of the case, to Elizabeth Deupert Mathieu, the widow of the decedent. From that decree Mary A. Mathieu, his mother, took the present appeal.

It being admitted that the designation by Mathieu of his mother as his beneficiary was valid and in accordance with the by-laws of the association when made in 1897, the single issue raised by the appeal is whether that designation was avoided by the changes which we have mentioned, subsequently made in the by-laws. There can be no doubt that he was subject to the legitimate operation of the by-laws of the association. That liability on his part was not only inherent in his relation of membership, but he specifically stipulated in signing the required application for membership, a copy of which appears in the record, to conform to and abide by the constitution, by-laws, and regulations of the association and of any council thereof of which he might at any time be a member, "which may now be in force or which may at any time hereafter be adopted by the proper authorities." He thereby consented in advance to all reasonable changes to be properly made in those laws and regulations.

The precise question which we are called upon to consider is whether sections 4 and 2 of the by-laws adopted in August, 1908, had such retroactive operation as to invalidate or terminate the designation, made before their passage, of Mr. Mathieu's mother as his beneficiary, and substitute his wife to that position.

Conceding in this connection that an amendment of the by-laws could not impair the vested rights of any one who had not consented to it, the weight of authority is that the mere designation of a person as beneficiary by the member of a mutual benefit society does not confer upon the person so designated any vested right in the fund, payable on the death of the member. 29 Cyc. 126; 3 Am. & Eng. Encycl. 990; Bacon on Benefit Societies & Life Insurance (3d Ed.) § 291; Shipman v. Protected Home Circle, 174 N. Y. 398, 67 N. E. 83, 63 L. R. A. 347; Chambers v. Maccabees, 200 Pa. 244, 49 Atl. 784, 86 Am. St. Rep. 716; Sabin v. Phinney, 134 N. Y. 427, 31 N. E. 1087, 30 Am. St. Rep. 681. It therefore follows that Mr. Mathieu's mother having had no vested right in the $1,000, payable on his death by the association, no objection to the validity of the amendment of its by-laws, made on August 16, 1908, arises from the fact that she was by its operation deprived of the benefit of that fund. The amended by-laws imposed no hardship on the member. They gave him the right to make a new designation of his beneficiary, if he desired to do so, in all cases in which the original designation was rendered inoperative by their passage, and also made it lawful for him to redesignate the same beneficiary. It was only in the event of his failure to exercise his right of making a redesignation or a new designation that the fund became payable on his death to the members of his immediate family in the order of precedence, under which his widow was first entitled to it.

The acknowledged rule of construction of legislative statutes, by which they are held to be prospective in their operation, in the absence of a clearly expressed intention to give them retroactive force, has been generally applied to the by-laws and regulations of corporate bodies. But the courts have frequently held that by-laws of mutual benefit and similar societies, in view of the nature of the associations adopting them and the character of the by-laws themselves, operated upon and controlled the relations of existing members to the society and their rights to its future benefits, although such laws were not expressed in retroactive terms. Such has generally been held to be the rule, where the member has agreed to be

bound by such laws as might thereafter be enacted. 29 Cyc. 75, note 55, and page 82, note 75, and cases there cited. Gilmore v. Knights of Columbus, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17; Fullenwider v. Royal League, 180 Ill. 261, 54 N. W. 485, 72 Am. St. Rep. 239; Knights of Columbus v. Rowe, 70 Conn. 550, 40 Atl. 451; Pain v. Société St. Jean, etc., 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; Parish v. N. Y. Produce Exchange, 169 N. Y. 34, 61 N. E. 977, 56 L. R. A. 149; Supreme Lodge v. Knights, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; Supreme Lodge v. La Malta, 95 Tenn. 157, 31 S. W. 493, 30 L. R. A. 838; Eversberg v. Maccabees, 33 Tex. Civ. App. 549, 77 S. W. 249.

The amendment now under consideration being reasonable in itself and intended to effect a modification of the benefit policy of the association that was within the scope of its original design, and one in which its members generally were alike interested, we do not think that the mere fact that it was not retroactive in terms should be held to manifest an intention on the part of the association to limit its operation to the cases of such persons only as should thereafter become members. Under such circumstances, it is more rational to conclude that the intention of the association was to make the change which the amendment produced in its benefit policy applicable to its then present as well as its future membership. This conclusion applies with especial force to the case of existing members, such as Mr. Mathieu, who by the terms of their application for membership, in effect, consented in advance to such reasonable changes in the by-laws as might thereafter be made.

The decree appealed from, being in accordance with the views which we have expressed, will be affirmed.

Accord. Masonic Mut. Ben. Ass'n v. Severson, 71 Conn. 719, 43 A. 192; Obrien v. Supreme Council Catholic Ben. Legion, 176 N. Y. 597, 68 N. E. 1120.

UNION FRATERNAL LEAGUE OF BOSTON v. JOHNSTON.

Supreme Court of Georgia, Nov. 1905. 124 Ga. 902.

Members. Remedies in Order, Court.

Fish, C. J. (after stating the facts). 1. A member of a benefit society must, in applying for benefits under its by-laws, follow the procedure therein prescribed. It is a well-settled rule that before resorting to the civil courts for redress, a member must exhaust all the remedies provided by the society by appeal or otherwise. Bacon, Benef. Soc. and Life Ins. § 94. In Harrington v. Workingmen's Benevolent Ass'n, 70 Ga. 340, it appeared that the by-laws of the association provided, that no claim for benefit would be received or acted on except through the sick committee and on a doctor's certificate furnished it; that 12 members should be annually appointed by the president as a grievance committee, with power to try all complaints brought to their notice, from whose decision there should be no appeal. It was held that such by-laws were not contrary to law, and a member could only avail himself of the rights to be enjoyed in the way and manner provided by such rules; and that the furnishing of a doctor's certificate to the sick committee was a prerequisite to receiving a benefit under a claim for sickness. In rendering the opinion Mr. Justice Crawford said: "Among the objects of the organization of this benevolent association, it is evident that the mutual aid to be rendered to the members thereof by the observance of self-imposed duties and obligations was among the most important. It was to be a brotherhood of workingmen; governed, managed, and controlled by its own membership, under its own laws, without extrinsic compulsion. Its operation for the execution of its benevolent designs were to be internal, and by person of its own appointment; provision was made to accomplish all the ends in view; there was nothing in any of its laws prohibited by statute or constitution; hence, whosoever became a member, could only avail himself

of the rights to be enjoyed in that way and manner provided by its rules."

Leave was granted to the defendant in error to review that case; and after a careful consideration of the same, we are of opinion that the ruling therein made should be adhered to. In the present case, it appeared from the contract between the plaintiff and the defendant league, as shown by the certificate issued to him, that he agreed to comply with the constitution, laws, and rules of the league in force at the date of the certificate, and also those that might thereafter be enacted for the government of the league. The constitution required that in case of contention as to any claim by virtue of sickness, the matter should be referred to the committee on arbitration, for adjustment, and provided that no suit should be brought against the league without first referring the matter to the grievance committee, with right of appeal to the cabinet and from thence to the annual congress. The plaintiff admitted that he had not followed this prescribed procedure; that he had never even appealed to the grievance committee. He sought to relieve himself from the necessity of so doing by showing that the defendant had absolutely denied any liabiliay on his claim. Granting that such denial on the part of the defendant would amount to a legal excuse for the plaintiff's failure to exhaust the remedies prescribed by the constitution and by-laws of the league, we think that the evidence shows that he wholly failed to prove his contention as to such denial of liability. It is true that he, in general terms, testified: "'They refused to pay me, saying they were not liable for eczema." But he also testified: "I think when I first wrote the league, they notified me that they had not received any certificate from the doctor. I then had doctor fill out one and he sent it off. Still there was delay. I wrote them again, I think, and then got this letter [referring to the letter above quoted from the 'cabinet secretary'], declining to pay." By reference to this letter it will be seen that the secretary stated that no action had been taken on the plaintiff's claim, because no affidavit of his attending physician had been received, though proper blank for such affidavit had been sent him. The letter also called the attention of the plaintiff to

the fact that the nature of his disease was eczema, and that under article 11, § 3, of the constitution and laws, the league did not pay benefits for eczema. The article and section of the constitution referred to declared: "Nor will sick and disability benefits be allowed for the following diseases or complaints, if contracted prior to the issue of the certificate: rheumatic, gouty or neuralgic diseases, eczema, and other named diseases." The secretary expressly called the attention of the plaintiff to this article and section of the constitution, a casual examination of which would have shown him that it was only where eczema had been contracted prior to the issuance of the certificate that a member was debarred from a sick benefit on account thereof. The plaintiff was evidently aware of this, for he testified: "They had paid me before for the same disease, and I thought they would pay me this time." From the foregoing we think it clear that the verdict was without evidence to support it, and that, for this reason, the court should have granted a new trial.

Whether benefit societies or associations of like character, may create tribunals for the final and conclusive settlement of controversies arising under their contracts of membership, or their contracts of insurance, is a question upon which the authorities do not agree, some courts holding that they may, and others that they may not. Niblack, Acc. Ins. & Benef. Soc. § 49. In the case under consideration, we do not deem it necessary to decide the validity of the provision of the constitution of the defendant league declaring that "no suits will be allowed on sick or disability claims." What we do decide is that under the evidence the plaintiff bound himself to comply with the prescribed procedure for the collection of his claim before bringing suit thereon, and that he failed to do so without legal excuse.

2. The court instructed the jury that "the by-laws and constitution that were in effect, at the time Mr. Johnston became a member of this fraternal society, are the by-laws and constitution alone which are binding upon him, and that any adopted thereafter are not binding upon him." This charge was erroneous, as Johnston, when his certificate was issued, agreed to comply not only with the constitution, laws, and rules

then governing the order, but with all that might thereafter be adopted for its government. Under such agreement, he was bound to comply with the procedure prescribed for the collection of sick benefits, even though such procedure was prescribed by amendment to the constitution or by-laws subsequent to the date of his certificate.

3. It appears from the record that D. B. Lester, the sole surety on the appeal bond given by the Union Fraternal League, was the garnishee in a garnishment proceeding founded on the case under consideration. No objection was raised in the superior court by Johnston, the appellee in that court, as to the sufficiency of the bond, nor was any ruling there invoked as to that matter. In this court, counsel for Johnston for the first time raises the question as to the sufficiency of the appeal bond, and contends that the judgment of the superior court rendered in the case should be affirmed for want of a sufficient appeal bond. We are clear that the contention is without merit. Counsel cites, as authority for his contention, the case of McMurria v. Powell, 120 Ga. 766, 48 S. E. 354. The ruling made in that case is obviously not in point here. That was a claim case tried in a justice's court and there decided against the claimants, who appealed to the superior court. The sole surety on the appeal bond was the same person as the surety on the claim bond. For this reason, the appellee moved in the superior court to dismiss the appeal, contending that no proper appeal bond had been given. This motion was overruled, and upon a review of such ruling it was reversed by this court, upon the ground that the plaintiff in execution had no additional security on the appeal bond, as the surety on it was the same as the surety on the claim bond.

Judgment reversed.

Accord. Robinson v. Templar Lodge, 117 Cal. 370, 49 Pa. 170; Manger v. New Era Ass'n, 156 Mich. 645, 121 N. W. 823.

Note. A denial of all liability by the society is a waiver of the failure of plaintiff to proceed under laws of the order. Patieveeka v. Independent Western Star Order, 114 S. W. 572 (Mo.)

MASONIC MUT. BEN. SOC. v. BURKHART.

Supreme Court of Indiana. 1887. 110 Indiana, 189.

Change of Beneficiary.

Appeal from superior court, Marion county.

On demurrer to complaint. Petition for rehearing. For the original opinion, see 10 N. E. Rep. 79.

Rev. St. Ind. 1881, § 3850, in article 3 of chapter 34, relating to "Corporations—Lodges and Societies," is as follows: "All certificates of membership, policies, or other evidences of interest in any Masonic, Odd-Fellow, or other benevolent or charitable association, society, or incorporation, named in section one of this act, [section 3848,] shall be regarded as a contract between the person whose life is insured by such certificate of membership, policy, or other evidence of interest, and the association, society, or incorporation of which he is a member; and it shall be lawful for such association, society, or incorporation to change the name or names of the payee or payees, beneficiary or beneficiaries, named in such certificate of membership, policy, or other evidence of interest, on such terms and conditions as the parties to the contract may agree to."

Mitchell, J. In support of the petition for a rehearing, it is contended that the right of a member of a charitable association to change the beneficiary designated in his certificate of membership is derived from the constitution or the rules and regulations of the society of which he is a member, and that, unless the right to change is reserved in the constitution or by-laws of the society, or in the certificate of membership, such right does not exist. Hence it is argued that, because it does not appear in the complaint in this case that such a right was so reserved, Mrs. Burkhart took a vested interest in the certificate of membership, which was not and could not be affected by the act of 1877 referred to in the opinion. Our conclusion then was, and to that conclusion we still adhere, that unless the constitution or by-laws of the society, either expressly or by necessary implication, denied or restricted the

privilege of the association and the member to agree upon a change in the name of the beneficiary, such right existed and could be exercised. The right to change the contract by the mutual agreement of the parties is not derived from the charter and by-laws, but may be either directly or impliedly limited thereby. Unless the power to change is thus limited, the beneficiary named in a certificate of membership has no vested interest in the fund prior to the death of the member. If, at the time the contract of membership involved in the case under consideration was made, the charter or by-laws were such as to prohibit a change in the beneficiary designated in the certificate, then Mrs. Burkhart took a vested interest, and the act of 1877 did not affect her rights, or authorize a change without her consent. If there was no prohibition against a change in the constitution of the association, then the act referred to had no effect upon the transaction one way or the other.

That act declares that certificates of membership in charitable associations shall be regarded as contracts between the members and the association. Such certificates were contracts between the members and the society before, precisely as they were after, the act. The statute was merely declaratory of what the law was in that respect from the beginning. Prior to the statute it was competent, however, for a charitable association, in its constitution and by-laws, to limit or prohibit the right to make changes in the names of beneficiaries after they had once been designated as such. Since the statute went into effect, and became incorporated into the constitution of such societies, no limitation or restriction repugnant to its terms can be imposed upon the society and its members by any regulation of the association. The effect of the statute was simply to take away the power of such associations, by any regulation, to impose restrictions upon the rights of the parties to the contract, or to prevent them from making any changes in respect to the beneficiaries which they might afterwards agree upon.

The petition for a rehearing is overruled.

KNIGHTS OF MACCABEES OF THE WORLD v. SACKETT et al.

Supreme Court of Montana. 1906. 34 Montana 357.

Change of Beneficiary.

Holloway, J. Floyd L. Sackett was a member of the order of the Knights of the Maccabees of the World, having his membership in the local tent at Park City, Mont. He carried insurance on his life in the association to the amount of $1,000; his wife, Fannie Sackett, being named in the certificate of insurance as beneficiary. For some time prior to May, 1905, Floyd L. and Fannie Sackett had not lived together. The former made his home at Yule, N. D. The latter lived at Park City, Mont. Prior to May, 1905, Floyd L. Sackett wrote a letter to his mother at Park City, requesting her to call on the local record keeper of the tent of which Floyd L. Sackett was a member, and ask him to change the beneficiary in his certificate of insurance from Fannie Sackett to Clarence M. Sackett and wife. This request was accompanied by the required fee of 50 cents. The request was made of the local record keeper by the mother of the insured, but she was thereupon informed that under the by-laws of the order the wife of Clarence M. Sackett could not be named as a beneficiary, and the record keeper then filled out a proper application for change of beneficiary upon a blank form furnished by the association and mailed the same to Floyd L. Sackett, to be by him duly executed. This he did on May 8, 1905, and in the certificate he named his brother, Clarence M. Sackett, as sole beneficiary, and deposited this application in the post office at Yule, N. D., properly addressed to the local record keeper at Park City. The letter containing this application was carried to Sentinel Butte, the nearest railroad point, in the usual course of business, and was taken by the west-bound Northern Pacific train No. 3 on May 9th. This train passed through Park City in the early morning of May 10th; but train No. 3 in the course of its business did not leave mail at Park City, but carried the mail for that point on west until it met train

No. 2, eastbound, when the mail for Park City was transferred to train No. 2, and by that train left at Park City. The letter containing this application was therefore not delivered at Park City until May 10th at about 3 p. m., and was received by the local record keeper immediately thereafter. In the meantime, however, Floyd L. Sackett on May 10th, received a fatal wound and died at 9:45 a. m. of that day. Not knowing of Floyd L. Sackett's death, the local record keeper forwarded the application, with the fee, to the supreme tent at Port Huron, Mich., where on May 17th, a new certificate was issued, in which Clarence M. Sackett was named as beneficiary. This new certificate was received at Park City on May 21st, and delivered to Clarence M. Sackett. After the death of Floyd L. Sackett both Fannie and Clarence M. Sackett made claim to the insurance money, and, in order to be relieved from annoyance, the governing body of the association commenced this action, setting forth these facts and asking that the claimants be brought into court and made to litigate their respective claims. The money was paid into court, the plaintiff association relieved from further liability, and the contending claimants then agreed upon the facts substantially as herein set forth. Upon this agreed statement of acts the court found the issues in favor of Fannie Sackett, and judgment in her favor was entered, from which Clarence M. Sackett appealed.

The contentions of appellant are succinctly set forth in his brief as follows: "Upon the foregoing statement of facts we assert the following propositions: First. The deceased had a right to change the beneficiary in his certificate of insurance by complying with the by-laws of the association. Second. If he failed to comply with all of the by-laws of the association regarding such change, and the association waived such requirements not complied with, the association alone having the right to insist upon a full compliance with its by-laws, the respondent cannot take advantage of such failure. Third. The deceased did all he could before his death to make the change of beneficiary from his wife to his brother (the appellant). The association, by voluntarily interpleading and paying the money into court, has waived noncompliance with its by-laws, and the court will consider that done which ought to be done."

1. The first contention may be conceded. It is too well settled to be open to argument.

2. As a legal proposition, the second contention is not stated accurately. It should be to the effect that, if the insured failed to comply with all of the by-laws of the association regarding such change, and the association during his lifetime waived such requirements not complied with, the association alone having the right to insist upon a full compliance with its by-laws, the former beneficiary could not take advantage of such failure. As thus stated there cannot be any question of the correctness of this contention, and, as we understand him, counsel for respondent does not controvert the same. That any waiver by the association must occur during the lifetime of the insured is too well settled in reason and by the authorities to require extended notice. The association contracts that it will at the death of the insured pay to the person named as beneficiary the amount of the policy. It is a contract between the association and the insured for the benefit of a third person, and the only interest of the beneficiary is in expectancy, until the death of the insured vests in the beneficiary the right to claim the amount of the benefit, and immediately upon the happening of that contingeny a right of action in favor of the beneficiary arises which the courts will enforce. This being so, the reason for the rule that after the death of the insured the association cannot waive anything to the prejudice of the beneficiary is perfectly apparent; and that this is the rule is beyond question. 1. Bacon on Benefit Societies and Life Insurance, § 308; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506; McLaughlin v. McLaughlin, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83; Wendt v. Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470; 3 Am. & Eng. Ency. Law (2d Ed.) 998. By paying the money into court the association waived, so far as it could do so, the failure of the insured to comply strictly with the by-laws of the order; but such waiver could not impair rights which became vested upon the death of the insured.

3. With respect to mutual benefit insurance, it is well settled that the insured may at will change the beneficiary. It is a general rule that in making such change the insured must pro-

ceed in accordance with the regulations contained in the policy and by-laws of the assoiation, and any material deviation from the course thus marked out will invalidate the transfer; but to this rule certain exceptions have been noted. In a leading case upon this subject these exceptions are announced as follows: "(1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate to him, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued. (2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary; but, before the new certificate is actually issued, he dies, a court of equity will decree that to be done which ought to be done, and act as though the certificate had been issued." Supreme Conlave Royal Adelphia v. Cappella (C. C.) 41 Fed. 1.

Neither the first nor the second of these exceptions is relied upon here. The last contention of appellant, however, is that Floyd L. Sackett had brought himself within the third exception above, and a court of equity ought to decree the change of beneficiary from Fannie to Clarence M. Sackett to have taken place prior to the death of Floyd L. Sackett. We are called upon to say, then, whether, under the facts agreed upon, Floyd L. Sackett had done all that he could do prior to his death to effect the change of beneficiary. The by-laws of this association provide the method to be pursued by the insured in order to make this change. They also provide that the change shall take effect upon delivery to the local record keeper of the old certificate, or, in case of its loss, proof of such loss, with a written request for such change, designating the new beneficiary. In this instance the old certificate was not lost, but it must be conceded that the association could waive failure to deliver it. The first application for a change made by Floyd L. Sackett did not comply with the by-laws of the association in a number of respects, and particularly in that it sought to make the wife of Clarence M. Sackett a beneficiary, whereas

by the by-laws of the order she could not be such; and the association not only did not waive these defects, but refused to make the change. However the local record keeper sent to Floyd L. Sackett an application for change, to be executed by the insured, in which he should name some qualified person as beneficiary. It does not appear that there was any obligation resting on the local record keeper to do this and it was apparently a gratuitous act on his part. This blank application was received by Floyd L. Sackett and duly executed by him. He then attempted to deliver it to the local record keeper as he was required to do. He chose the United States mail as the agent to make the delivery for him. He might have taken it himself, or sent it by messenger personally. But in any event he had to assume the risk that the agent employed would fail to deliver the request at all, as in case of destruction of the mail enroute, or the death of the messenger, or that delivery would not be made until a date so late as to be of no effect. No importance whatever is to be attached to the fact that he selected the mail as the agent to make this delivery for him. It was nevertheless his agent. Peabody v. Satterlee, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; McCorkle v. Texas Benevolent Ass'n, 71 Tex. 149, 8 S. W. 516. In this instance the agent which he chose delivered his request in the ordinary course of business; but before delivery was made, the insured died. At the time of the death of the insured his request for such change had been not been delivered; and the case is not made different by the fact that it was actually delivered on the day of his death and only about six hours after that event occurred. If delivery one hour after his death would work the change of beneficiary, then delivery a week or a month after death would be equally effective. But such is not the law. The interest of the beneficiary attaches instantly upon the death of the insured, and the question whether a change has been effected must be determined as of that particular instant of time. In this instance there was simply a failure on the part of the agent employed by the insured, to make the delivery to the local record keeper before the death of the insured.

With reference to that particular point of time the failure

was just as complete as it would have been had the letter containing the request been lost long before the train carrying it reached Park City. Had the letter been delivered into the post office at Park City prior to the death of the insured, and there merely awaited the call of the local record keeper for his mail, a case akin to those wherein equity has applied the rule that that will be deemed done which ought to have been done might have been presented, and the transfer made to date from the time when it would have become effective, had the local record keeper promptly called for his mail. Instances of the character of the case just supposed are to be found in the reported cases. Jory v. Supreme Counsel, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Luhrs v. Luhrs, 123 N. Y. 367, 25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754; Hall v. Allen, 75 Miss. 175, 22 South. 4, 65 Am. St. Rep. 601; Sanborn v. Black, 67 N. H. 537, 35 Atl. 942; Hancock Mut. L. I. Co v. White, 20 R. I. 457, 40 Atl. 5; and Supreme Conclave Royal Adelphia v. Cappella above—are all cases of this character; but every one is easily distinguishable from the case now under consideration. When Floyd L. Sackett died he had not delivered to the local record keeper his request for a change. He had intended to do so, but the agency selected by him failed to deliver the request until after his death. The failure of his agent was his failure. When he died, the title of Fannie Sackett to this money became absolute, and the receipt of the request by the local keeper subsequently to the death of Floyd L. Sackett did not affect her right; for the association had become her debtor for the full amount of the insurance. The case of Fink v. Fink, above, is well considered, is directly in point here, and, in our opinion, correctly states the rule as we have announced it.

The judgment of the district court is affirmed.

Affirmed.

ROSS et al. v. ROGERS.

Supreme Court of Arkansas. Oct. 17, 1910. 131 S. W. 336.

Right of Beneficiaries.

Appeal from Circuit Court, Pulaski County; F. Guy Fulk, Judge.

Action by Emma Rogers against Lucy Ross and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Hart, J. This suit was commenced in a justice of the peace court by appellee against appellants to recover the sum of $225 alleged to be due her on a policy of life insurance. The justice rendered judgment in favor of appellants. On appeal to the circuit court, there was a trial before a jury, and the court directed a verdict in favor of appellee. From the judgment rendered, an appeal has been duly prosecuted to this court.

The facts, so far as material ,are as follows: On the 14th day of January, 1906, the St. Mark Lodge, United Brothers of Friendship and Sisters of Mysterious Tent, a fraternal insurance corporation organized under the laws of the state of Arkansas, issued a policy of life insurance for $225 to one of its members, Philip Jones, in favor of Emma Rogers. In December, 1908, upon the written application of said Philip Jones the beneficiary named in the policy was changed from Emma Rogers to Lucy Ross. and, as changed, the policy was in force at the death of the insured, which occurred some time during the following January. The by-laws of the association contain a provision that any member in open lodge may ask for the change of the name of the beneficiaries in his policy, and that the secretary shall change the name and keep a record of the same.

In the case of Beasely v. Mutual Aid Association et al., 127 S. W. 974, this court held that the beneficiary in a policy of this kind had no vested right therein. To the same effect, see Strickland v. Strickland, 87 Ark. 131, 112

S. W. 197. Hence the only question which affects the rights of appellee in this case is whether or not there has been an actual change of beneficiaries before the death of the insured. The records of the association show that such change was made before the death of the insured. The insured, according to the testimony introduced by appellee, applied to the company by a written communication to change the name of the beneficiary in his policy, and designated the person whom he wished to be substituted. This communication was delivered to appellant company in open lodge, and was accepted by it. The company thus recognized his right to change the beneficiary and accepted this method of doing so.

Whether the change is strictly according to the by-laws is immaterial. The by-laws authorized the change, and the change was made by defendant company on the application of the insured, and the company now is estopped from questioning the validity of the change. Beasely v. Mutual Aid Ass'n et al., supra; Smith v. Metropolitan L. Ins. Co., 222 Pa. 226, 71 Atl. 11, 20 L. R. A. (N. S.) 928, 128 Am. St. Rep. 799. Appellee, having no vested right in the policy, could not question the method by which the change of beneficiaries was made. She was only interested in the question of whether or not a change had actually been made.

It follows that the court erred in directing a verdict for appellee, and for this error the judgment must be reversed, and the cause will be remanded for a new trial.

VIVAR v. SUPREME LODGE KNIGHTS OF PYTHIAS

Supreme Court of New Jersey. 1890. 52 N. J. L. 455.

Suspension. Warranties. Beneficiaries.

Dixon, J. This suit was brought to recover the amount due on two certificates, in terms as follows: "Certificate of membership, first class, $1,000. No. 6,118. Endowment

Rank of the Order of Knights of Pythias. This certifies that Brother Darius Vivar has received the Endowment Rank of the Order of Knights of Pythias in section No. 311, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his application, bearing date of June 24, 1879, which application is made a part of this contract, and the payment of the prescribed admission fee, and in consideration of the payment hereafter to said Endowment Rank of all assessments as required, and the full compliance with all the laws governing this rank now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the said sum of one thousand dollars will be paid by the Supreme Lodge, Knights of Pythias of the World, to Emily Louisa Vivar, his wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the supreme master of exchequer, upon due notice and proof of death and good standing in the rank at time of death, and the surrender of this certificate: provided, however, that if, at the time of the death of the said Brother Darius Vivar, there shall be less than one thousand members in this class, there shall only be paid a sum equal to one dollar for each member in good standing in this class. And it is understood and agreed that any violation of the within mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate, and all claims, null and void, and that the said supreme lodge shall not be liable for the above sum, or any part thereof. In witness whereof we have hereunto subscribed our names, and affixed the seal of the Supreme Lodge, Knights of Pythias of the World. D. B. Woodruff, Supreme Chancellor. [L. S.] Joseph Dowdall, Supreme Keeper of Records and Seal. Issued this 5th day of July, 1879." etc. The other certificate is in the same form, but in the second class, for $2,000. Darius Vivar died April 24, 1882, and suit on these certificates was brought by Emily Louisa Vivar, in July, 1888, on the trial of which action the learned justice directed a

verdict for the plaintiff, and gave the defendant a rule to show cause why the verdict should not be set aside, which rule is now to be decided.

Of the grounds on which the defendant seeks to support the rule, the first to be considered is that Darius Vivar was not in good standing in the rank at the time of his death. The Supreme Lodge of the K. of P. is a corporation created in 1871, pursuant to the laws of the District of Columbia. By its constitution, it is declared to be the source of all true and legitimate authority in the order of K. of P., wheresoever established. Under it, in the various states and territories of the Union, are organized grand lodges, one of which is known as the "Grand Lodge of K. of P. in the State of New Jersey." Subordinate to this grand lodge is, among others, the Olive Branch Lodge of Elizabethport. Speaking generally, the supreme lodge consists of representatives from the various grand lodges, and each grand lodge is composed of certain past officers of its subordinate lodges. Membership in each subordinate lodge is derived from election therein. The Endowment Rank is a voluntary mutual life insurance association, open to members of the order only. It was established and is governed by the supreme lodge, and is divided into numerous local sections. Any member of a subordinate lodge desiring to enter the Endowment Rank joins such section of the rank as is most convenient. Article 4 of the constitution of the rank provides that, if a member of a section is suspended from his lodge for any cause, his membership in the rank ceases at the time of suspension from the lodge; but, should the action of the lodge be reversed by higher authority, the standing of the member would be the same as if no action was had, and he must pay all assessments made during such suspension. Upon this article the defendant contends that Vivar was not in good standing in the rank when he died, and upon this article also does the plaintiff rely for her answer to the contention.

Article 6, No. 2, of the constitution of Olive Branch Lodge, provides that each applicant for membership shall sign an application stating his age, occupation, and resi-

dence; and article 9 provides that every member violating any of the obligations, established principles, laws, rules or regulations of the order, disregarding the requirements of the constitution or by-laws, may be suspended from the lodge, in accordance with the laws, rules and regulations. When Vivar joined the lodge in June, 1879, he stated his age, in obedience to the second section of article 6, just mentioned. On September 7, 1881, written charges were preferred against him before the lodge, as follows: "Specification No. 1. Violations of the laws of this country. No. 2. For giving a false age upon entering the lodge. No. 3. For conduct unbecoming a Knight." Pursuant to other clauses of the constitution, these charges were referred to a committee of five Knights for trial. Vivar appeared, and was represented before them, and testimony was taken. On October 28, 1881, the committee reported to the lodge that there was no evidence to support the first or third specifications; that, as to the second, all the members of the committee believed that a false age had been given; and three members of the committee did not believe that a false age was given with any malicious intent, or intent to defraud. On November 9, 1881, the report and the testimony were read before the lodge, and the committee was discharged. Then motions that specification No. 2 be sustained, and that Vivar be suspended for 99 years, were carried by a vote of 19 to 6.

Whether these proceedings were in substantial accordance with the constitution of Olive Branch Lodge, which is ordained by the grand lodge, and not alterable by the subordinate lodge, may certainly be questioned. That constitution requires the committee to reduce their opinion as to the guilt or innocence of the accused to writing, and present it to the lodge. If the report in Vivar's case complied with that provision, it seems to be properly construed as a finding in favor of his innocence; for the purport of the opinion of the majority is that he had made an honest mistake as to his age, and certainly guilt cannot be predicated of such an error. The constitution directs that, at the next stated meeting of the lodge after presentation

of the report, it shall be considered by the lodge, and a ballot be taken, when, a majority of the ballots cast being in favor of the report, it shall be recorded as the judgment of the lodge. There is no provision as to the procedure when a majority of the ballots cast are against the report. Under these circumstances, the vote of the lodge, on the question of sustaining the charge, should be deemed a vote to sustain only so far as the committee had reported in favor of it, and in that aspect it is difficult to see how it justified the infliction of any penalty. A penalty of practical expulsion from the order was certainly unreasonable. If, now, we turn to the by-laws of Olive Branch Lodge, which may supplement but cannot override its constitution, a similar conclusion will be reached. They provide that the trial committee "shall examine and determine the matter in question, and, if no appeal be taken from the decision of the committee to the lodge, it shall be final, as far as the guilt or innocence of the implicated brother is concerned, without other action from the lodge." In Vivar's case, no appeal was taken to the lodge, and consequently he should be regarded as exonerated from guilt, in accordance with the report of the majority of the committee. The vote to suspend him for 99 years—in effect to expel him, without adjudging him guilty of any offense—was unlawful, beyond the authority of the lodge, and therefore void. A member of an association in which he has pecuniary rights cannot be expelled, unless he is found guilty of an offense which either affects the interests or good government of the association, or is indictable by the law of the land. Com. v. Society, 2 Bin. 441. An attempted expulsion, without a conviction, had in accordance with the rules of the society or with the general principles of law, is nugatory, and the membership of the individual continues. Innes v. Wylie, 1 Car. & K. 257.

But, if it be conceded that the vote of the lodge did in fact suspend Vivar, the plaintiff in reply insists that the action of the lodge was "reversed by higher authority," and hence, according to article 4 of the constitution of the Endowment Rank before quoted, the standing of Vivar as a

member was the same as if no action had been taken against him. By the constitution of the supreme lodge, grand lodges have (subject to a right of appeal to the supreme lodge) exclusive original jurisdiction over all subordinate lodges within their territorial limit, and over the members attached to the same; and all power and authority, not reserved to the supreme lodge, is delegated to the grand lodges. By the constitution of the Grand Lodge of the State of New Jersey, approved by the supreme lodge, it has jurisdiction over all lodges within this state, and possesses the right and power of receiving and hearing all appeals, and of redressing grievances and complaints arising in the lodges under its jurisdiction. According to that instrument, the committee on appeals and grievances shall hear all appeals and grievances from lodges or members of lodges referred to them by the grand lodge or grand chancellor, and report their decision to the grand lodge or to the grand chancellor during the recess. It also provides that every member, considering that injustice has been done him by the decision of his subordinate lodge, may, within one month after such decision has been made, present to his subordinate lodge a written appeal therefrom; whereupon certain proceedings are to be taken by the member and the lodge to bring the appeal to a hearing, in default of which the appeal may be dismissed by the committee on appeals and grievances, to the disadvantage of the lodge or member not attending to the same.

According to the testimony in this suit, Vivar was sick at the time the vote passed for his suspension, in November, 1881, and so continued till his death in April, 1882.

Within 30 days after that vote, he prepared an appeal, and delivered it to one of the members of the trial committee, who was also president of that section of the Endowment Rank to which Vivar belonged. It does not appear that this appeal was prosecuted in conformity with the rules prescribed in the constitution. But at the session of the grand lodge held next after the death of Vivar, viz., on February 21, 1883, the matter of Vivar's suspension was referred by the grand lodge to the committee on appeals

and grievances, with power to investigate the same, and report to the grand chancellor, with their recommendations, and the grand chancellor was ordered to promulgate and enforce the same. On March 24, 1883, the committee reported to the grand chancellor that they had thoroughly and carefully examined the matter, including the records of the lodge, the evidence taken at the trial, the report of the trial committee, and the action of the lodge; and that they were convinced that the charges against Vivar were illegal, that the notice to him was illegal, that his trial was illegal, that the conviction was not in accordance with the evidence, and that the punishment was not in accordance with the findings; that Vivar did not make false representations regarding his age, but plainly stated that he was not sure of it; and that, although the law regulating appeals had not been complied with, it would be an act of gross injustice to enforce it in that case; and their judgment was, that at the time of his death Vivar was in good standing in Olive Branch Lodge, and also in the Endowment Rank, and entitled to all the benefits and privileges that could arise from his connection with said lodge and the Endowment Rank; and they recommended that the section should be notified of the action taken, and the lodge should be directed to make an immediate settlement with Vivar's widow. On April 5, 1883, the grand chancellor notified Olive Branch Lodge that he approved of the report, whereby the action of the lodge in the case of Vivar was set aside, and directed it to pay to his widow the weekly benefits due him at the time of his death, and also the funeral benefits stipulated in its by-laws. With this direction the lodge complied. The section of the Endowment Rank was also notified, and thereupon made due requisition upon the proper officer of the Endowment Rank for payment of Vivar's insurance money.

This action of the committee on appeals and grievances of the grand lodge, if valid, evidently reversed the action of the Olive Branch Lodge, and therefore placed the standing of Vivar in that lodge on the same footing, for all purposes of the Endowment Rank, as if no suspension had

taken place. Its validity is, however, disputed, first, upon the ground that the grand lodge and its committee had no power, except upon an appeal regularly taken and prosecuted. This position is not tenable. The prescriptions with regard to appeals are designed for the government of subordinate lodges and their members, but they are not limitations upon the authority of the grand lodge and its committee. This is manifested in the constitution of the supreme lodge, by which original jurisdiction over subordinate lodges and their members is conferred on the grand lodges, and all the power and authority of the order, not reserved to the supreme lodge, are delegated to them. It is also indicated by the constitution of the grand lodge of the state, which gives it the right and power, not only to hear appeals, but also to redress grievances and complaints arising in subordinate lodges; and which permits, but does not require, the committee on appeals and grievances to dismiss appeals not regularly taken or prosecuted. Grievances may imperatively demand redress, even when appeals have not been taken, and it would work injustice if there did not exist somewhere power to excuse non-compliance with these prescribed formalities; and clearly in this order that power belongs to the grand lodge.

The second ground on which the validity of the action of this committee is denied is that Vivar, being dead at the time, could not be restored to membership. But it was not required that he should be actually restored to membership. It was enough, in the words of the constitution of the Endowment Rank, if the "action of the subordinate lodge was reversed by higher authority." His death in no way prevented such a reversal. The rights to be impaired by that action survived him, and the persons in whom those rights vested were as really aggrieved thereby as he would have been had he lived. Their grievance, arising in the Olive Branch Lodge, the grand lodge had power to redress. It is an every-day occurrence to reverse judgments erroneously rendered against those who have since died, and, although such a reversal cannot restore the status of the decedent in fact, it may do so in legal contemplation.

The last ground for denying the validity of this reversal is that the grand lodge and its committee had no authority over the Endowment Rank. That they had no direct authority must be conceded. But, as already shown, they had direct authority over the action of Olive Branch Lodge in suspending Vivar, and could and did set it aside. Thereupon, not by the mere authority of the committee, but, by force of the constitution of the Endowment Rank, the case was as if no action to suspend Vivar had ever been taken, as if he had always stood well in his lodge, and therefore, by this same constitution, he retained membership in the rank until his death, so far as it depended on his standing in the lodge. We conclude that there was nothing in this aspect of the matter which impedes the plaintiff's recovery.

The defendant also denies Vivar's good standing in the Endowment Rank, for the reason that he did not pay the assessments made during his suspension. There are two sufficient answers to this claim. One is, that Vivar was not notified of them, and the laws of the rank declare a member suspended only in case he neglects to pay within 30 days after notice. The other is that, under the proper construction of article 4 of the constitution of the rank, a member who has been suspended by action of his lodge is not required to pay assessments until that action is reversed. In our opinion, Vivar must be considered to have been in good standing in the Endowment Rank at his death.

The next ground on which the defendant seeks a new trial is that although Vivar, in his application for membership in the Endowment Rank, in response to the question, "State definitely to whom you wish the benefit made payable, and relationship to you," had answered, "To my wife, Emily Louisa Vivar," and although by the certificates sued on the sums insured were made payable to "Emily Louisa Vivar, his wife," yet the trial judge rejected evidence offered by the defendant to show that, before and at the time of the plaintiff's marriage to Vivar, he had a lawful wife living, and both he and the plaintiff

knew it. The defendant, while admitting that the plaintiff is the person intended by the contract, yet insists that her being Vivar's lawful wife was made a condition of the obligation; that, as a part of the contract, Vivar warranted the existence of such relationship. By the terms of the certificates, the application forms part of the contract. Nevertheless the statements contained in it are not necessarily, for that reason, warranties. In order to have the force of a warranty, the statement must, indeed, constitute part of the contract; but whether even such a statement should be deemed a warranty depends upon the just construction of the entire agreement. Courts do not favor warranties by construction, and hence parties will not be held to have entered into the contract of warranty unless they clearly appear to have intended it. If the contract refers to statements contained in another paper for some other purpose than to give them the force and effect of warranties—for instance, if it refers to them as "representations"—or if the purpose is doubtful, such reference will not convert the statements into warranties. Of themselves, statements in the application are mere representations, and they will not become conditions or warranties, unless the parties plainly evince an intention to make them such, either by so denominating them, or by declaring the validity of the contract to depend upon their literal truth. May, Ins., Nos. 158-165; Insurance Co. v. Day, 39 N. J. Law, 89. Even calling the statements warranties will not make them such, when other terms in the contract indicate a different understanding. Fitch v. Insurance Co. 59 N. Y. 557; Anders v. Supreme Lodge, 51 N. J. Law, 175, 17 Atl. Rep. 119. Under these rules, the statements in the application now before us are not warranties. The certificates do not so designate them, but, on the contrary, style them "representations;" and in making them part of the contract must be deemed to incorporate them as representations. Nor is there in the contract any provision to the effect that, if they be false or untrue or inaccurate, the insurance will be void. The clause at the end of the certificates "that any violation of the within mentioned

conditions * * * shall render the certificate and all claims null and void," must be understood as referring to matters which, by other parts of the contract, are made conditions, and cannot of itself create a condition out of what had been before mentioned as a representation only. The trial court, therefore, properly held that the statement concerning the relationship between Vivar and the plaintiff was not a warranty.

It remains, however, to determine what effect it should have upon the contract, if considered as a representation untrue to the knowledge of the insured; for to that extent was the defendant's offer of proof. In order to invalidate a contract, a representation made during the negotiations must not only be willfully untrue, but must also be material, or, at least, must appear to have been thought material, by the party to whom it was made. To quote the language of Prof. Parsons: "It is obvious that the fraud must be material to the contract or transaction which is to be avoided because of it, for if it relate to another matter, or to this only in a trivial or unimportant way, it affords no ground for the action of the court. It must therefore relate distinctly and directly to this contract, and it must affect its very essence and substance. * * * Nor can we give a better rule for deciding the question (whether the fraud be material or not) than this: If the fraud be such that, had it not been practised, the contract would not have been made or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties in the same way, if the fraud had not been practised, it cannot be deemed material." 2 Pars. Cont. 769. So, in Anerson v. Fitzgerald, 4 H. L. Cas. 484, Lords CRANWORTH and ST. LEONARDS both express the opinion that a wilfully false representation, made in obtaining a policy of life insurance, will not vitiate the contract, unless it be material, or be deemed material by the insurer, or the policy declare that the mere falsity of the statement shall avoid the insurance. A similar view was announced in Valton v. Association, 20 N.

Y. 32, and in many other cases cited in notes to Carter v. Boehm, 1 Smith, Lead. Cas. 619, 641 (9th Ed. 791, 809). Where the defense is that a representation collateral to the contract was false and fraudulently made, the gist of the defense is the fraud of the plaintiff, by which the insurer was misled, and induced to make the contract of insurance. Insurance Co. v. Martin, 40 N. J. Law, 568, 573. If the representation made, though known by the insured to be false, did not differ from the truth in any respect which was, either in fact or in the view of the insurer, material to the contract, then the falsehood did not mislead the insurer, or induce the contract, and should not be allowed to avoid it. Usually, the materiality of a representation will be inferred from the fact that it was made pending the negotiations, in response to a specific inquiry by the insurer; but this rule is not universal; for the purpose of the inquiry must be considered, to see whether the information is sought to aid the insurer in fixing the terms on which he will contract, or with an entirely different object. Thus, if a mutual insurance company should require its premiums to be paid within a definite time after the mailing of notice addressed to the residence of the insured, and with this rule in view should require every applicant for insurance to state his residence in his application, and an applicant should give as his residence, not the truth, but the place where he ordinarily received his mail, it would seem absurd to hold that such circumstance could invalidate the contract. In the present case, the inquiry related merely to the payee of the money for which the insurer was to become responsible, and by the very terms of the contract subsequently made the insurer expressly left the designation of the payee to the absolute discretion of the insured; the language of the certificates being that the supreme lodge will pay the sum insured to "Emily Louisa Vivar, his wife, as directed by said brother (Vivar) in his application, or to such other person or persons as he may subsequently direct by will or otherwise." A similar power is given to the insured by article 9 of the constitution of the rank. It seems mani-

fest that a subject thus committed to the control of the insured was not material to the contract of the insurer, nor so regarded by the insurer; and that, if Vivar had declared Emily Louisa Vivar to be not related to him, as the lodge now alleges the truth to have been, the contract would have been made on precisely the same terms as at present. While, therefore, the fact that the question was put might justify an inference that relationship between the payee and the member was thought material, yet the express terms of the certificates, and the provisions of the constitution, force the conclusion that it was not. In this respect the Endowment Rank of the Knights of Pythias differs from those benevolent societies which are organized for the benefit of members and their families solely, and with regard to which it has been properly held that the relationship of the payee is material. Supreme Council v. Green, 17 Atl. Rep. 1048; American Legion v. Smith, 45 N. J. Eq. 466, 17 Atl. Rep. 770.

The defendant further insists that the relationship was made material by the legal necessity that the beneficiary should have an insurable interest in the life insured. In New Jersey, the tendency of judicial opinion seems to be in favor of the proposition that the assured need not have an interest in the life insured, in order to support the contract of insurance. Insurance Co. v. Johnson, 24 N. J. Law, 576; Martin v. Insurance Co., 38 N. J. Law, 140. Elsewhere contracts of insurance without such an interest are generally condemned, as being contrary to public policy; yet even in those jurisdictions the ordinary rule appears to be that when a person effects an insurance on his own life, and in the policy designates another person as payee of the sum insured, the latter may maintain an action on the policy without showing an insurable interest in the life. Campbell v. Insurance Co., 98 Mass. 381; May. Ins. § 112. In view of the opinions heretofore expressed in this court, we should apply this rule to the present case, and hold that an insurable interest in the payee of these certificates was not requisite, and that consequently her relationship to Vivar did not become material on that ground. Our con-

clusion is that the relationship of Vivar to the plaintiff was not material to the contract, either in fact or in contemplation of the insurer, and that, therefore, the falsity of Vivar's statement regarding it could not invalidate the insurance.

The last reason urged for a new trial is that Vivar in his application misstated his age. There was, however, no testimony produced at the trial which would warrant a finding to that effect. On the whole, we think that justice was done by the verdict, and that the rule to set it aside should be discharged.

CHAPTER VIII.

FIRE AND PROPERTY INSURANCE.

SIMERAL v. DUBUQUE MUTUAL FIRE INSURANCE COMPANY.

Supreme Court of Iowa. April 1865. 18 Iowa 319.

Insurance is a personal contract relation.

Wright, J. An obvious thought in relation to companies of this character is that they should have the power of determining who should be admitted as members, and whose property they will insure. The character of the assured, it is manifest, may be an important consideration. Not only so, but the general rule is, that an insurance against fire is a personal contract with the assured; and the policy does not pass so as to continue the liability of the company to an assignee or purchaser of the property insured, unless by the consent of the underwriters or the properly authorized officers or board of the association. Angell on Ins., Par. 193; Lane v. Maine Mutual Insurance Co., 3 Fairf., 44; Wilson v. Hill, 3 Metc., 66; 2 Am. Lead. Cas., 464-613; Granger v. Howard Insurance Co., 5 Wend., 200; Macomber v. Cambridge Mutual Fire Insurance Co., 8 Cush., 133; Ayers v. Hartford Insurance Co., 17 Iowa, 176; Neely v. Onondago Company, 7 Hill, 49. The articles of incorporation now under consideration recognize the right of the company to determine who shall become members thereof, and clearly indicate that the assured cannot, at his option, transfer the policy and property, and thereby transfer the liability of the company, to his assignee and alienee. A method is pointed

out, by which the alienation may be ratified and the purchaser entitled to all the rights and privileges and subject to the liabilities of the party originally assured. This is the method adopted by the company for its own protection, and these provisions plaintiff could not disregard. By complying with them, she would have obtained a new and original promise from the company, and thereby secured a valid insurance. But the contract, in effect (one of indemnity with the owner), was at an end when the property was sold, and could not be revived or become available to the alienee without ratification or confirmation, as contemplated by the charter. There is no pretense of waiver, or anything of that kind, on the part of the company; and we need not therefore, consider the effect thereof. The demurrer admits the facts as stated in the answer; and as these facts would preclude a recovery, it was properly overruled.

Accord. Lindly v. Orr, 83 Ill. 70; Carpenter v. Providence Washington Ins. Co., 16 U. S. 495; Carroll v. Boston Mutual Ins. Co., 8 Mass. 515; Cummings v. Cheshire County M. F. Ins. Co., 55 N. H. 457; Carlson v. Presbyterian Board, 67 Minn. 436.

WILSON v. HILL.

Supreme Court of Mass. 3 Met. 66.

The basis of all property insurance is indemnity.

Shaw, C. J. But it appears to us, that the claim of the plaintiff to recover in this action is founded upon an entire misapprehension of the nature and legal effect of a contract of insurance. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the pres-

ervation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him, against any loss, which he sustains, in case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interest, before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee, to indemnify him in like manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. Even the assignment of a chose in action, with the consent of the debtor, and a promise on his part to pay the assignee, constitute a new contract, on which the assignee may sue in his own name. (Mowry v. Todd, 12 Mass. 281.)

For the general principles herein stated, we would refer to the authorities cited by Mr. Chapin. Lynch v. Dalzell, 3 Bro. P. C. (1st. ed.) 497. The Sadlers' Company v. Badcock, 2 AtK. 554. Marshall on Ins. (3d ed.) 800-807. Carroll v. Boston Marine Ins. Co. 8 Mass. 515. Aetna Fire Ins. Co. v. Tyler, 16 Wend. 397.

These considerations, however, do not apply to a case, where the assured, after a loss, assigns his right to recover that loss; it would stand on the same footing as the assignment of a debt or right to recover a sum of money actually due, which, like the assignment of any other chose in action, would give the assignee an equitable interest and a right to recover in the name of the assignor, subject to set-off and all other equities.

All the considerations, applicable to the assignment of a personal contract of indemnity, apply with still greater force to a case of mutual insurance, where each and all the members have an interest in knowing their associates and in deciding who shall become members. In the present case, even if the general principle were less clear, there is a provision in the by-laws, which are referred to as part of the contract, (art. 12.) that "any person selling his property, may surrender his policy and receive back his deposit note;" a clear implication, that the right to the benefit of the insurance does not pass with the estate to the purchaser. The principle of the contract is mutual indemnity. After such a sale and transfer of the estate, who is to stand responsible to other members for their losses, during the continuance of the unexpired policy? Not the seller; because the considertaion, on which he became liable, has ceased, and his notes are cancelled and given up, and his obligation discharged. Not the purchaser; because he has never given any note pursuant to the by-laws and terms of the contract, nor in any way bound himself to contribute to the losses of others of the company.

Besides; indorsed on the policy, or annexed to it, is a blank form, first of a formal written permission, to be executed by the officers of the company, authorizing an assignment of the policy, and the form of an actual assignment by the assured. This operates, at least by way of notice, that the policy was not to be assigned, without the expressed consent of the company.

Accord. Carpenter v. Providence Washington Ins. Co., 16 Pat. (U. S.) 495.

THOMPSON v. ADAMS.

Supreme Court of Judicature, L. R. 23 Q. B. D. 361.

The Binding Slip. Consummation of Contract.

Mathew, J. This was an action brought to recover the sum of £100, which it was alleged by the plaintiffs the defendant had agreed to cover by an insurance against fire upon the goods of the plaintiff in premises of theirs in New Zealand. The action was resisted on the ground that there had been no contract of insurance, or in the alternative, if there had been a contract of insurance, that it was subject to conditions which had not been fulfilled, and, therefore, that the underwriters were not liable.

The plaintiffs are merchants carrying on business in New Zealand, and they were represented in this country by a firm of Geard & Sons, who acted for them under a power of attorney. They instructed Geard & Sons to effect insurances upon goods on their premises in New Zealand; and Messrs. Geard & Sons, for that purpose, about the month of October, 1886, placed themselves in communication with a firm of insurance brokers of high standing, Messrs. Collins & Co., who undertook to endeavor to effect insurance to the amount of £20,000. Now, insurances had been effected in the same way previously, and amongst the insurances previously effected were some of Lloyd's. It appears, within the last four or five years the underwritters at Lloyd's have undertaken, in addition to their ordinary business, the business of insurances against risks on land—against fire risks—and insurances had for this period been effected at Lloyd's by Messrs. Thompson; and Mr. Adams, the present defendant, it appeared, had taken a line on some of the previous policies. Messrs. Collins & Co., not being members of Lloyd's, had placed themselves in communication with Mr. Bray, an insurance broker, who was entitled to effect insurances at Lloyd's; and Mr. Bray, in accordance with the usual course of business, prepared a slip containing the particulars of the proposed insurances, and showing the risk in the same way as if it were a marine risk

to the underwriters at Lloyd's. Amongst others the risk was shown to the defendant, who initialed the slip on behalf of others whom he represented for £300, of which £100 represented the amount of his insurance.

In the ordinary course with reference to risks of this description, as well as with reference to maritime risks, the slip is followed by a policy of insurance. In the particular case the slip was initialed in October, 1886. The policy ought to have been put forward through the broker and signed by the underwriters; but, strange to say, no policy was tendered for signature down to the end of the month of February following. On February 28th, news reached this country that the premises of the plaintiffs had been burnt down on the previous day, and a quantity of their goods destroyed. Up to this time, as no policy had been issued, no premiums had been paid, but upon March 1st the premiums upon all the insurances were paid by the plaintiffs to Messrs. Collins & Co. The defendant, however, with other underwriters, refused to accept the premium, or to sign a policy, or to pay the amount for which the slip had been initialed. Upon that the claim was put forward against the defendant upon the slip, and it was asserted by the plaintiffs that the slip was a sufficient insurance under the circumstances, and that the fact that no policy had subsequently been signed was immaterial. The defendant set up as a defense the absence of the policy, and declined to pay. Under those circumstances it was that the action was brought against him.

Now several lines of defense were adopted by the defendant before me, and were argued with great ability on his behalf. In the first place, it was said there was no policy of insurance. In the second place, it was said, as I have already mentioned, that if there were any contract of insurance, it was a contract subject to the condition that a policy should be subsequently issued. Thirdly, it was said that in the particular case the conduct of the plaintiffs and their agents showed that they had abandoned the insurance, and elected not to complete it by a policy, and, therefore, that the defendant was not liable. It was said that it was a breach of good faith on the part of the plaintiffs to put forward a policy which never would have been put forward if the fire had not occurred.

It was said that this alleged contract was only to be gathered from the slip initialed by the underwriters, but that the slip was no contract; that it was only an honorary undertaking on the part of the underwriters to make a contract subsequently, and that being so, the underwriters chose in the present case not to be bound by it. It was alleged that it was right and fair, under the circumstances, that they should not be bound by it, and that, therefore, there was an end of the matter. I had evidence laid before me with reference to this curious point, for it strikes one at first glance that it was certainly a most extraordinary course of business that the underwriters were setting up. They were suggesting that it should be taken that this slip was procured, not for the purpose of securing protection to the assured, but of getting a piece of paper with some writing upon it, which had no meaning whatever in point of law. That did not seem very likely. One knows how important it is that there should be a prompt insurance in respect of goods against fire risks. Considering how great the risk is to an individual, and how small a premium he has to pay, the great object is to get himself insured against damage by fire, and according to this theory no man could effect a prompt insurance at Lloyd's against damage by fire. There must be an interval between the slip and the subsequent policy, and that interval would leave the underwriter free, if he thought proper not to accept the risk. Approaching the consideration of the evidence by the light of common sense, I was prepared for the result. The plaintiff's witnesses all said that the slip was a contract, and regarded as a binding legal contract to effect a subsequent insurance. There is no statutory difficulty in the way, and no reason why the slip should not be a binding contract, and there is every reason for supposing that such would be the intention of the person presenting the slip to be initialed in respect to the risk. On the other hand, there was the evidence of the underwriters, and the underwriters sought to set up a custom to treat these slips as honorary undertakings only. It has become manifest that they could not rely upon a single fact to prove the existence of the alleged custom, and that they were only treating me with what a judge has so often to hear, an opinion—a

strong opinion—of the witnesses on the one side as to the merits of the case, and of what the result of the litigation ought to be. All these gentlemen thought it was very wrong under the circumstances of this case that this slip should be anything more than an undertaking, out of which the underwriter could get if he thought fit. Some light was thrown upon the value of their opinion by the evidence of one of the principal witnesses, who said: "I regard this slip against fire risks in the same way as a slip against marine risks, and a slip against marine risks is only an undertaking in horror, because the statute forbids that it should be more, and I consider the statute applies to an insurance against fire, and therefore it is to be treated exactly as the same thing, and that is the custom at Lloyd's." Unfortunately, the reasoning broke down, because the statute does not apply, and there is no reason why a contract should not be entered into by the slip; there is every reason, indeed, to suppose that the parties would intend it to be a contract, and upon that point, I am against the defendant. I think there was a binding contract to insure, and that the contract contained in the slip is not one from which the underwriter could escape on the ground that it was only optional whether or not he should go on with the contract, and perfect it by a policy of insurance.

Then there was an alternative point, and it was that to which Mr. Barnes bent all his energy; he said, assuming that this slip is to be treated as a protecting note, like that which is ordinarily issued by an insurance company (for insurance companies recognize the necessity for prompt insurance, and before the policy is issued they will issue a protecting note which will have all the effect of a policy until the document has been prepared,) still there ought to be read into this slip an implied condition. An implied condition is a condition to be proved by circumstantial evidence, not by anything that passes in a particular case in terms between the plaintiff and the defendant, but a contract to be inserted because the conduct of the parties shows it is the basis of the whole arrangement. The proviso, said Mr. Barnes, that I ask to read in is this: the contract contained in the slip is to be upon the condition, that within a reasonable time the policy is put forward

for signature, and if it be not put forward within a reasonable time the insurance is to be at an end. That was the proviso that I was asked to insert, as it were, in this slip; and really the sole ground upon which that argument rested appeared to me to be that there is an interval ordinarily between the date of the slip and the time when the policy is sent. The course of business is, that, after the slip has been completely initialed, the policy should be prepared by the broker (Mr. Bray in this case), and submitted to the different underwriters; and when they have signed the policy, as a matter of business, the amount of the premium appears for the first time in the accounts, and the contract is supposed to be complete in all formal particulars. Now, that is inevitable. That delay between the slip and the policy it is impossible to avoid. In the first place, it is not because a particular underwriter initials a slip, that the matter is completed at Lloyd's, or completed anywhere else. The broker has to go round and get all the risk covered; but, further, he has to obtain in many cases precise information as to the nature of the risk—what is called technically the wording—and when the property insured is property abroad, the interval would be longer, necessarily, than if it were at home. On this point again I had a great body of evidence laid before me on each side. The plaintiff's witnesses said the delay is nothing; the matter is complete when the slip is initialed. That is the business view of the affair. The underwriters are none the worse off for any delay; they very often do not trouble themselves very much as to the time the policy comes forward; and in support of that view the plaintiffs produced a number of slips, some initialed by the defendant himself, in which it appeared there had been a long interval, of weeks and months in some instances, between the date of the slip, and the date of the policy. On the other hand, witnesses were called for the defendant, who said that the understanding was that the policy was to be put forward promptly, and if it was not put forward the transaction ought to be regarded as being at an end. But, again, no single instance could be adduced by any of those witnesses to throw light on a supposed course of business, and I am satisfied that the defendant's contention upon this

point is wrong. See what the consequences would be of adopting their view. If such a clause was to be written into the policy, there must necessarily be an interval of time between initialing the slip and the completion of the policy, during which preparations would be made for laying the policy before the underwriters for their signature. What is the position of the underwriter meanwhile? Clearly he is on the risk. Then, according to the argument if the policy be put forward within a reasonable time he is bound to sign it, legally bound to sign it. Then, in the interval, he is upon the risk; but, according to the defendant's argument, this proviso would enable the assured, at the expiration of a reasonable time, to be off. Having kept the underwriter on the risk, and the interval being so ended, he could say: I avail myself of that proviso, which is to be treated as part of the slip, and I get rid of my liability to pay the premium. When the defendant's witnesses were examined, they were compelled to prove a course of conduct which was totally inconsistent with such a state of things, because it was proved, that, when there was delay, repeated demands were made by the underwriters themselves as to the reason for the delay. There was one answer to the defendant which really put him out of court on this matter. He was asked: "Now, if no fire had occurred in this case, and the premium had been tendered to you in the month of February, would you have taken it?". "Yes," he said, "I should have regarded the tender of the premium as an indication of good faith, and I should have signed the policy."

That seems to me to make an end of that point which had been made by the defendant. From the evidence, I find, as a fact, that there is necessarily an interval between the slip and the policy in all these cases; and I am satisfied that it would be most unreasonable to read such an implied contract into the slip. There must be judgment for the plaintiffs upon the issues tried before me.

Judgment for the plaintiffs.

Note. The authorities agree that there should be read into the binding slip the usual terms and stipulations of the policy issued in that community by the insurer. Lipman v. Niagara Fire Ins. Co., 121 N. Y. 454.

MERCHANTS' MARINE INSURANCE CO., Appellants, v. RUMSEY AND JOHNSON, Respondents.

Supreme Court of Canada, 1884. 9 Can. S. C. 577.

Risk Assumed. Insurable Interest.

Stephen C. Tupper and William Mouzar chartered the schooner "Mabel Claire" for a trading voyage from Nova Scotia to Labrador and back, and not having sufficient means themselves to load the vessel with merchandise for the voyage, made an arrangement with the plaintiffs to supply them with a cargo. Application for this arrangement was first made to the plaintiffs at Liverpool, where the vessel then was, by Tupper, through a friend of his, who had agreed to give him a certain amount toward his supplies, and that such portion should stand as security to the plaintiffs that they should be paid first. The arrangement was not then completed, but Tupper put goods on the vessel at Liverpool to the amount of $1,200, and took the vessel to Halifax, where the arrangement with the plaintiffs was completed, by which it was agreed between Tupper and Mouzar and the plaintiffs, that the plaintiffs should furnish the greater part of the cargo for the trading voyage, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advances, and pay over any balance remaining to Tupper and Mouzar. In trading on the voyage Tupper and Mouzar were not to dispose of any goods on credit, but were to bring such goods as they could not dispose of so as to obtain a return cargo in lieu thereof. Accordingly the plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding $6,000, and, after having done so, and upon the day on which the vessel sailed from Halifax, effected with the defendants the policy of insurance sued upon to the amount of $2,000, on merchandise under deck, from Halifax to Labrador and back to Halifax on a trading voyage—time not to exceed four months—shipped in good order and well conditioned, on board schooner "Mabel Claire," be-

ginning the adventure upon the said goods and merchandise from and immediately following the loading thereof on board said vessel, and to continue and endure until the said goods should be safely discharged and landed. On the 13th July, 1878, the vessel sailed on her voyage with Mouzar as master, and Tupper as supercargo. In the course of the voyage they disposed of all the goods which had been laden on the vessel, with the exception of goods to the value of about $1,000, with which on board, together with a large return cargo, the vessel, when on her return voyage to Halifax, within the four months named in the policy, together with her cargo, was lost by the perils insured against.

Ritchie, C. J., Two points were raised in this case. First, Did the policy cover only the goods laden at Halifax? Second, Have the respondents proven sufficient interest to entitle them to recover? As to the first point: This case seems to me abundantly clear; the policy was, in my opinion, unquestionably intended to cover, during the trading voyage from Halifax to Labrador and back, all "the merchandise under deck" on board said vessel during the period mentioned in the policy, viz., for four months from the 13th July, 1878, shipped in good order, and was not confined to the goods shipped at Halifax and brought back to Halifax. The policy dated 13th July, 1878, insures to the extent of $2,000 on the undermentioned property, from Halifax to Labrador and back on trading voyage—time not to exceed four months,—shipped in good order and well conditioned, on board the schooner 'Mabel Claire."

Then what is the undermentioned property? Description of goods insured; merchandise under deck; amount, $2,000; rate, 5 per cent; premium, $100, to return two (2) if risk ends 1st October and no loss claimed.

Trading voyages are well understood. The goods are constantly shifting. The idea is simply to barter the goods taken from Halifax between that place and Labrador, and to bring back to Halifax the goods obtained by such bartering, and the goods insured were all merchandise under deck on the trading voyage from Halifax to Labrador, and back, irrespective of where the same may be taken on board, whether

on the voyage from Halifax or on its return, provided they were merchandise under deck on the trading voyage. I can discover nothing whatever to limit the subject-matter of the insurance contemplated by this policy to the original cargo on board at Halifax. There is nothing, in my opinion, in the terms used, on the most strict construction of language, to justify such a conclusion—if we take the nature of the voyage—"a trading voyage"—the termini, "Halifax and Labrador and back to Halifax," that it is to be an insurance on the trading voyage from Halifax to Labrador and back to Halifax, the object of such a voyage being for trade and barter, that is, the exchange from time to time, and from place to place during the continuance of the voyage, of the delivered cargo for a return cargo, which, from the coast between Halifax and Labrador, we may take historical, if not judicial, notice, would be a fish cargo. Then, the duration of the risk—four months, the rate, 5 per cent,—everything, in my opinion, indicates that it was never intended by the parties that there was to be an insurance on a single passage from Halifax to Labrador, nor can it be supposed that it was contemplated that the cargo taken in Halifax would be brought back in specie as shipped there. On the contrary, the cargo brought back would be obtained by barter or sale of the outward cargo, and from this a return cargo, and therefore unless the term "and back" referred to such return cargo it would be meaningless. "From Halifax to Labrador" fix in my opinion, merely the termini of the trading voyage, and the subject-matter of insurance, "merchandise under deck," "if shipped in good order and well conditioned," on such "trading voyage."

There is no language in this policy such as "beginning the adventure from the loading thereof on board at Halifax,' or any language intimating that the policy is only to attach on goods loaded at that port, which is the terminus a quo of the trading voyage insured, viz., "from Halifax to Labrador and back," and the reason is very obvious: and such language would be utterly inconsistent with the nature of the voyage, the provisions contained in the policy, and the object the parties must have had in view in effecting the policy. Had it been the intention of the parties that the policy should be so re-

stricted, I cannot doubt but that unequivocal language, so limiting, would have been used, and in its absence, bearing in mind the character of the voyage and the terms used, the irresistible inference is that no such limitation was contemplated.

In what in principle does this differ from the constant and everyday practice of insuring goods or stock-in-trade in a store for a given period, where the insured reproduce the same stock? Has it ever been doubted or questioned that a policy on a stock of goods covers such after acquired and substituted goods? According to defendant's contention, the return cargo in this case would not be covered at all. It cannot be supposed that either party could have contemplated that the trading voyage would be utterly fruitless, and that the goods taken from Halifax would not be used for the purpose for which they were shipped, but would be brought back to Halifax.

As to the second point—that the plaintiffs have no insurable interest in the goods—the evidence, I may say the uncontradicted evidence, on this point as to the transaction and the plaintiff's interest in the goods lost, is as follows—

B. A. Rumsey sworn:—My partner is Johnson,—Rumsey, Johnson & Co. The schooner "Mabel Claire" loaded most of cargo July, 1878. Value of cargo I think between $9,000 and $10,000. Had arrangement with Stephen C. Tupper to fit him out, a verbal arrangement. We were to supply most of cargo for trading voyage. We took bills of lading of it. The return cargo was to come back to us. We were to dispose of cargo and pay ourselves, and pay them the balance. It was to be a trading voyage to Newfoundland and back. The whole return cargo was to come back to us. This is the B. L. of cargo we put on board, only what we put on board. It is signed by the master of the schooner * * * Cargo was put on board by Weir Brothers and others, which we paid for, but it is not in this B. L. Tupper put in some of the cargo himself. The whole of it, including what Tupper put in, was insured by us, and was subject to the arrangement I have spoken of.

G. R. Johnson:—Partner in R., J. & Co. I made arrangements with Tupper. He wanted supplies for a trading voy-

age to Labrador. Had chartered new schooner "Mabel Claire". He wanted us to supply. He applied to me at Liverpool, N. S., through a friend of his who offered to give him a certain amount toward his supplies, and that as security to us he would allow that portion to go as security as a preference that ours should be paid first. I asked him what amount. He said probably ten thousand dollars. The arrangement was not made at Liverpool. I promised to telegraph to him what we would do. When I returned, the vessel was here, and I made arrangements for the firm with Tupper and Mouzar. We were to supply them and have complete control of all the goods until they got back. They were to give no goods out on credit, and sooner than give credit they were to bring the goods back, and we would credit them with full price. They promised to bring back any goods for which they exchanged them. We were to effect insurance on them to the full extent of the cargo, and if there was not sufficient to pay everybody when they returned, we were to be paid first. They were our goods until they came back. When they went away they expected to make a profit on them. If they were successful they were to let us know what extra amount to price was needed for the benefit of the adventure.

To say that under this testimony the plaintiffs were merely unpaid vendors, with the right only of unpaid vendors, is simply to ignore the evidence in the case and the agreement which it clearly establishes. The only evidence apparently relied on in the court below as displacing the effect of this evidence is that of Rumsey, who, on cross-examination, in answer evidently to a question put to him, says:—

"If the goods had been lost on the voyage to Newfoundland without insurance, the loss, I suppose, would have been Tupper's."

I cannot see how this can possibly affect in any way the liability of the defendants to the plaintiffs. Plaintiffs had supplied Tupper, and no doubt looked to him personally for payment, as well as to the goods over which it was agreed that they should retain the control for the purpose of securing such payment. But whatever may have been the relative liabilities of the parties as between themselves, it is quite clear

that the plaintiffs had such a claim on these goods supplied and shipped as on the goods acquired and shipped in good order and well conditioned during such trading voyage as would have been enforceable against Tupper, had he endeavored to dispose of them and divert the proceeds from the plaintiffs contrary to the terms of the agreement.

Appeal dismissed with costs.

SCRIPTURE v. LOWELL MUTUAL FIRE INS. CO.

Supreme Judicial Court of Massachusetts, 1852. 10 Cush. 356.

Risk Assumed.

Assumpsit upon a policy of insurance on a dwelling-house, owned by the plaintiff, but in the occupation of one Elbridge Smith. The tenant's minor son carried a cask of gunpowder into the attic, without the plaintiff's knowledge, and fired it with a match, doing the damage stated in the opinion of the court. The case was submitted upon an agreed statement of facts to the Court of Common Pleas, Perkins, J., who rendered judgment for the plaintiff for the whole amount of damage. The defendants appealed to this court.

Cushing, J. The case finds that a burning match being applied, without fault of the plaintiff, to a cask of gunpowder in the attic of his house, the gunpowder took fire, exploded, set fire to a bed and clothing, charred and stained some of the wood-work, and blew off the roof of the house; and the only question in the case is, whether the loss thus occasioned to the building is covered by the conditions of an ordinary policy against fire. The question may be generalized thus: By the ignition of gunpowder within a dwelling-house, damage is done to the house, that damage consisting in part of combustion, and in part of explosion. Is the whole damage covered by a policy insuring "against loss or damage by fire?"

The very anomalous case of Austin v. Drewe has been adduced in argument and greatly relied upon as having appar-

ent analogy to this; but when that case is examined the analogy disappears. * * * The conflicting and imperfect reports of this case have led to various and contradictory misapprehensions of its import. On the one hand it has been supposed that the decision in Austin v. Drewe is put on the ground of carelessness of servants (compare Hughes on Ins. 507-511), and is thus in apparent contradiction with the decision of Dobson v. Sotheby, Mood. & Malk. 90, in which Lord Tenterden says, that "one of the great objects of insuring is security against the negligence of servants and workmen,"—which doctrine is now, in regard to fire policies, at least, the well-settled law both in Great Britain and the United States. 1 Phillips on Ins. c. 13, No. 2, 1049.

Another authority supposes the point decided to have been, that "in order to recover upon a policy against loss or damage by fire, it is not sufficient to show that the property has been damaged by the heat of fires usually employed in manufacture, and incurred by the negligence of the insured, or his servants, beyond its usual intensity. Ellis on Ins. 25." This construction of the case of Austin v. Drewe is inexact; for it does not plainly indicate that the real question in controversy was of damage to the subject-matter of manufacture.

On the other hand, the decision in Austin v. Drewe has been assumed to establish that "to bring a loss within the risk insured against, it must appear to have been occasioned by actual ignition, and no damage occasioned by mere heat, however intense, will be within the policy." 2 Marsh. on Ins. (3d ed.) 790. This proposition is not the point of the case; and it cannot be sound law; for it may well happen that serious damage, within the scope of a fire policy, shall be done to a building, or to its contents, by the action of fire in scorching paint, cracking pictures, glass, furniture, mantelpieces, and other objects, or heating and thus actually destroying many objects of commerce, and yet all this without actual ignition,—that is, visible inflammation.

All these manifest errors, and the doubts they throw over the case of Austin v. Drewe, are dispelled at once by the report of it in Holt and in Campbell, as it was tried at Nisi Prius.

If, in Austin v. Drewe, the fire had been where it ought not to be, if, even with careless management, it had burned the building, and notwithstanding it was fire maintained only for the purpose of manufacture, then all the observations of the court go to show that, in this instance, as in that of the whaleship mentioned in Emerigon (1 Tr. de Ass. 436). the insurers would have been held to be liable for the loss. This, therefore and this only, as correctly stated by Beaumont (Ins. 37), is decided by the case of Austin v. Drewe, namely, that where a chemist, artisan, or manufacturer employs fire as a chemical agent, or as an instrument of art of fabrication, and the article, which is thus purposely subjected to the action of fire, is damaged in the process by the unskilfulness of the operator, and his mismanagement of heat as an agent or instrument of manufacture, that is not a loss within a fire policy. This we apprehend is good sense and sound law. But it does not touch at all the present case.

It has been thought proper thus to analyze the case of Austin v. Drewe, because having been variously reported by four different reporters, and presenting itself prominently in several of the text-books, but in nearly all of them with more or less of misconception, it has become the starting-point, in legal construction, of conflicting lines of argument leading to sundry false conclusions, and, among others, that of a supposed application to the present question. * * *

The principle adjudged in the cases of this class will be readily seen by reversing the question. Suppose, not as fact but as mere supposition, a policy insuring against damage done through electricity generated by caloric. Obviously, this would not cover damage done by fire only, electricity not being evolved. So, in the actual case reported, of insurance against fire produced by lightning, if the effects be of lightning only, without exhibition of fire, it would not, according to the above decision, be within the policy. Or, suppose insurance on cattle against the risk of death by fire alone. In that assumption, if the cattle die, as they may, by a stroke of lightning, without a burn or any other action of fire on their bodies, it would not be the risk contemplated by the contract. Beaumont on Ins. 37. * * *

These cases of damage by lightning bear on the present question, therefore, if at all, only very distant analogy. Neither of them covers it, or has any direct relation to it. To the contrary of this, in New York, at least, the same courts, which decide that loss by lightning merely is not covered by a fire policy, decide that loss by the explosion of gunpowder is. There is a series of cases precisely in point, which expressly decide, or by implication assume, that damage done by the explosion of gunpowder ignited within a building, as well as that done by its combustion, is within the risk of a fire policy. The case of Grim v. Phoenix Insurance Company was this: A vessel, insured against fire, was partly laden with gunpowder, which, being ignited by carelessness, the vessel was blown up and totally lost. It was argued by eminent counsel, and the opinion was given by Thompson, C. J., and throughout the cause it seems to be assumed that the loss was, in respect to its cause, within the policy, and the decision was made to depend on other considerations. 13 Johns. 451. The same conclusion is also assumed in the case of Duncan v. Sun Fire Insurance Company, 6 Wend. 488. In the case of City Fire Insurance Company v. Corlies, the claim was on a fire policy for merchandise destroyed, not in burning, but through the blowing up of the building wherein it was stored, by means of gunpowder; and the court expressly adjudged this to be "a loss by the peril insured against, within the meaning of the policy." 21 Wend. 367. The same point has been ruled incidentally by the Supreme Court of the United States. Waters v. Merchants' Louisville Insurance Company, 11 Pet. 225. Perhaps it may add a little to the weight of these authorities to say, that the same thing as to loss by gunpowder—sulphureo pulvere accenso—seems to have been holden by the older commercial jurists in Europe. Straccha de Assec. gl. 18, No. 2.

This court, to be sure, is not bound by the decisions or opinions cited, but they are entitled to great consideration; and there is not, so far as we know, any contrary adjudication or opinion. Uniformity of decision is in itself a desirable thing. The question, we admit, is a nice one. Upon careful reflection, however, we have come to the conclusion that

the received opinions on the subject, and the adjudications referred to, are in accordance with reason and principle. It seems not to be denied that actual combustion, produced by the ignition of gunpowder, is within the present policy. If, then, a combustible substance, in the process of combustion, produces explosion also, it is not easy to perceive why, of the two diverse but concurrent results of the combustion, the one should be ascribed to fire any less than the other. The plain fact here is, the application of fire to a substance susceptible of ignition, the consequent ignition of that substance, and immediately damage to the premises thereby. It is no sufficient answer to say that some of the phenomena produced are in the form of explosion. All the effects, whatever they may be in form, are the natural results of the combustion of a combustible substance; and, as the combustion is the action of fire, this must be held to be the proximate and legal cause of all the damage done to the premises of the plaintiff.

Our opinion excludes, of course, all damage by mere explosions, not involving ignition and combustion of the agent of explosion, such as the case of steam, or any other substance acting by expansion without combustion. See Perrin's Administrator v. Protection Insurance Co., 11 Ohio, 146. It likewise excludes all damage occasioned but remotely or consequently through the agency of gunpowder, such as injury done to a house by falling fragments in the blasting of rocks, or the shattering of a house by the stroke of a cannon-ball, in which examples the shock of a projectile, and not ignition or combustion, is the proximate cause of the damage done. We recognize and accept, in the full force of its application, the maxim: In jure non remota causa sed proxima spectatur. Bacon's Max. 1.

The legal relations of marine insurance have been copiously discussed in many express treaties of elaborate erudition, and are considered in a great number of judicial decisions, in which the whole subject has been explored with wonderful acuteness and comprehension of logic and of learning; while fire insurance, as a branch of legal knowledge, is, comparatively speaking, in its rudiments. The cases on marine insurance throw little if any light on the present question, ex-

cept in so far as they attempt to prescribe a rule for distinguishing between what is remote and what is proximate cause. The conclusion reached in this discussion, as may be seen by the latest investigation of the point in Great Britain, Montoya v. London Assurance Co., 6 Welsb. Hurlst. & Gord. 451, is that, while for most cases it is practicable to draw the line, and to formalize a rule betweeen the two classes of causes, yet in other cases, according to the general law of nature, the two classes approach and run into one another until the distinction vanishes; and within the limits of this debatable land of differences, it is necessary to apply judicial discretion to the particular questions as they arise, just as it is in the not infrequent inquiry whether a thing, or the use or measure of it, be reasonable or not. In Montoya v. London Assurance Co., it was determined that where the lower part of a cargo is damaged by sea-water, and, by the evolution of gases from the part thus damaged, or the propagation of heat arising from fermentation, the superior part of the cargo be damaged also, the loss on the latter is by the perils of the sea, the involvement of the secondary effect in the primany one being an example of causa proxima.

In the present case there is no room for question concerning a series of causes, as whether primary or secondary, proximate or remote; for the agent is one and the same throughout, namely, fire. The causa was burning powder; the causa causans was a burning match; at each stage of causation it was the action of fire. Nay, to be exact, the burning of the gunpowder, like the burning of the match, was a succession of several complex acts of burning. Yet fire is the agent at each of these distinct stages of causation. Suppose there was a barrel of sulphur in the plaintiff's attic instead of gunpowder; and this being ignited with a match, afterwards the fire had passed from the burning sulphur to the substance of the house. This would be recognized at once as a case of fire. It does not change the legal relation of causes to substitute a barrel of burning gunpowder for a barrel of burning sulphur. The only difference in the elements of the question is, that the gunpowder, when ignited, consumes with more of rapidity then sulphur, and the combustion is accompanied

or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house.

On the other hand, cases are conceivable, other than by the use of gunpowder, of explosion without any combustion, which, nevertheless, being the result of the action of fire, are still, it would seem, within the range of the general principle. Various mineral substances exist of value in commerce and the arts, which explode by the action of the fire, without either ignition or combustion. In general, any close vessel, of whatever material composed, when filled with an expansive fluid, is liable to explode by the action of heat, though it may be that the vessel and its contents are alike incombustible. The same thing happens, under certain conditions, to some forms of wood, which, although combustible, may by the action of fire explode without ignition; or which, as in the present case, of a house, by having compressed within it some burning substance, which is explosive as well as combustible, like gunpowder, may suffer the double injury of combustion in part and in part of explosion.

If, however, the question of consequential damage needed to be explored for the determination of the present case, it would serve to confirm the conclusion to which we have on other premises arrived. Thus, in Great Britain, damage, which occurs consequentially in the case of a fire, by reason of confusion of mind, as in throwing fragile objects out of the window, or by sudden terror from alarm, as in leaving open the tap of a barrel, and thus wasting the contents, is held to be loss by fire, according to the usages of insurance officers or established legal principle. Beaumont on Ins. 41. So it is in the case of a beam, cornice, or coving, removed to prevent the spread of conflagration. Ibid. We understand the same to be the rule in the case, for instance, of a fire in the upper story of a building, and the destruction or damage of goods in lower story, not by fire, but by the water thrown into or upon the building, for the purpose of extinguishing the fire. All these are fit illustrations of the question of merely consequential damage. Its legal relations may likewise

be followed in the familiar case of the squib falling on a party's premises, and by him hastily thrown off, and so falling upon the premises of another, and thus giving rise to the inquiry, whether the first throwing or the second throwing should be taken as the responsible cause. Scott v. Shepherd, 2 W. Black. (2d ed.) 892 and notes; 3 Wils. 403.

In the hypothesis that fire is to be regarded as causa proxima in the present case, we can see but one supposable defect, namely, the suggestion that, though it be conceded that the explosion of burning gunpowder, and its effects, are the action of fire, yet this particular effect on the building is not exhibited in the form of igneous action. The cases above supposed, of the shrivelling of some masterpiece of pictorial art, the cracking or discoloration of a rich vase or gem, the bursting of a cask of wine through the expansion of its contents, these, it may be said, are distinctly cases of damage, without ignition it is true, but by the direct and specific action of heat as such; while it is denied that such is the fact in the present case of the blowing up of a dwelling house by the ignition of gunpowder. We do not think the premises of this argument are sustained by the physical facts which occurred. If they were so, then the nearest analogy would be of damage by smoke, that is, the moisture thrown off by burning wood, and carrying with it ashes, empyreumatic oil, and other constituent parts of the wood, either in their natural condition, or transformed by the process of combustion. Now, it is obvious that mere smoke, without any direct action of heat, may do great damage to many kinds of merchandise, such as delicate textile fabrics, esculent vegetables, articles of taste, and other numerous objects; and if a dwelling or a magazine take fire, and some parts of it only be consumed, but the contents of apartments, to which the actual fire does not extend, are nevertheless damaged by the smoke penetrating into and filling them, can it be doubted that the damage thus done is a loss within the ordinary conditions of a fire policy? Semble, per Gibbs, Chief Justice, arguendo, in Austin v. Drewe, Holt N. P. 127. Yet, incontestably, damage by smoke is an effect which is not in itself igneous action, though it be the result thereof; while, as we conceive, the explosion of gunpowder is igneous action.

In conclusion, we think the rule which we propose for the present case reconciles all the conditions involved in the question; is conformable to the nature of things; and constitutes a coherent and consistent doctrine, namely, that where the effects produced are the immediate result of the action of a burning substance in contact with a building, it is immaterial whether these results manifest themselves in the form of combustion, or of explosion, or of both combined. In either case, the damage occurring is by the action of fire, and covered by the ordinary terms of a policy against loss by fire.

Judgment for the plaintiff.

Note. The decisions as to the risk assumed, when the question involves loss, by explosion, or by fire, or a combination of the two, is to say the least, confusing. The following propositions we believe to be founded on principle. (1) A fire insurance policy covers all damage by explosion where the explosion is caused by fire. Renshaw v. Firemen's Ins. Co., 33 Mo. App. 394. (2) In a fire policy excluding loss by explosion, damage by fire caused by explosion is not of the risk. Mutual Ins. Co. v. Tweed, 7 Wal. (U. S.) 44. (3) A fire policy excludes all loss except that caused by fire. An explosion causes fire. Insurer is liable for the damage caused by the fire only, and not the damage caused by the explosion. Washburn v. Miami Valley Ins. Co., 2 Fed. 633.

VIELE v. GERMANIE INSURANCE COMPANY.

Supreme Court of Iowa, 1868. 26 Iowa, 9.

Increase in Risk.

The defense interposed in this case was that at the time the policy was issued, the building lost by the fire was used for mercantile purposes, and for the manufacture of materials which were not of extra combustible nature, but after the contract of insurance, and before the fire, the plaintiff leased portions of the building for the purpose of manufacturing rustic window shades; that the plaintiff did not first obtain the consent of the defendants to the change

in the use of the premises, which consent was stipulated for in the policy, and that the risk and hazard of the insured premises while being used as a place to manufacture rustic window shades was not included in the promise of the company; further that contrary to the express terms of the policy, the plaintiff permitted benzine to be kept on the premises. The plaintiff admitted the facts plead in the defense, but sought to avoid them by showing the consent of the defendants' agent to the change in the use of the premises, and of the keeping of benzine thereon.

General Verdict against the defendant.

Beck, J. This brings us to inquire what powers may be exercised by the agent within the scope of his general authority. Under this general authority he has power to conduct the business of insurance of his principals at the city of Davenport. This is the aggregation of all his powers, and he possesses implied authority to do all things proper and necessary in the prosecution of that business, subject of course to limitations imposed by his principals and known to those with whom he deals. These incidental powers may be numerous, and their enumeration is not necessary. Among others he has the power to assent to the increase of the risk, and to a change of occupancy of property insured, and to cancel policies on account of increase of risks or for any other reason. In the exercise of these powers he is guided by his own discretion, which it is presumed will be exercised for the best interests of his principals. He has, also, all the powers which by the usages of the business are properly and ordinarily exercised by agents engaged therein. Story on Agency, Nos. 77, 106.

It appears that insurance agents usually exercise supervision over the property insured by them, and this necessarily result from the character of the business and their authority to cancel policies on account of increase of risk. The agent is charged, by the terms of the policy on which this suit is based, with the power to determine whether the risk is increased. If he so determines, he may cancel the policy and put an end to the contract. This involves

the necessity of examination of the condition of the insured property during the life of the policy, and constant watchfulness to protect the interest of the underwriters. If he determines that the risk is increased, such determination is final, for it seems the assured has no appeal therefrom and no redress for loss that may be sustained thereby. Such being the great, and in some respects extraordinary, powers of the agent, it follows that he is clothed with the power to dispense with conditions and waive the effects of breaches thereof, in contracts of insurance made by him. These powers are necessary incidents of his general authority, and without their exercise he could not act to its full extent. If he can determine that the conditions of the contract have been broken, surely he can also determine that they have not been broken. If he can put an end to the contract because of the increase of the risk, and the consequent forfeiture, certainly he can waive that forfeiture. If, possessing such full authority to make the contract, determine that it is performed, and to put an end to it, he can not dispense with its conditions after it is executed, the rules of law controlling agents generally, and all kinds of contracts, must be held not applicable to insurance policies and insurance agents. These companies have no way of dealing with their customers and the public, except through their agents. They are incorporations existing under the laws of another State. Practically those powers can only be exercised by agents. They are inherent in the corporations, whose interest as well as fair dealing toward others (as it did in the case before us), may require their exercise. The agents, therefore, must be held to have full authority to dispense with the conditions of policies, after their execution, and to waive forfeitures for breaches thereof.

As we have already intimated, the law, in its application to other kinds of contracts, and to agents transacting other kinds of business, fully sustains the doctrines we have announced. This may readily be illustrated by facts disclosed by the record. The owner of the property upon which the policy in question was issued was a non-resident

of the State, and the business was transacted for him by an agent, who, it seems, exercised general powers in all matters pertaining to the property. Now, suppose this agent had executed a contract for the rebuilding of the property burned, or his principal had executed it, and it was delivered by the agent, blanks being filled by him under proper authority, with the name of the other contracting party, sums to be paid, etc. This contract contained many conditions, as we may suppose, for the benefit of the property owner, and the agent was authorized to assent in writing to the dispensation of certain of them, and the power to put an end to the contract in case of the failure of the other party to comply with its conditions. During the progress of the work, questions arose whether certain things done, or omitted to be done, by the builder, were in violation of the conditions of the contract. The agent, as to whose power not one word of limitation existed in the contract, or was otherwise known to the builder, asserts that the matters in question are not in violation of the contract, and treats it as complied with, or verbally assents to the dispensation of certain conditions. When the building is completed, in accordance with the contract as thus modified, the principal refuses to pay the sum agreed on, because of non-compliance on the part of the builder with the conditions thus waived by the agent. Upon no recognized rules of law could this defence be sustained, and we would have no difficulty in finding ample authorities in support of the doctrine that the waiver of forfeitures by reason of the breaches of the conditions, and the dispensation of the conditions by the agent, were binding on the principal. This supposed case is not distinguishable upon principle from the case disclosed by the record.

While it is true that these companies transact business only through their agents at distant points, it is also true that much of their business is acquired through the diligence, skill and capacity of these agents, and that parties effecting insurance rely in a great measure upon the representations made by them as to the rights and obli-

gations of the respective parties to the policies, and are controlled in the care of the insured property by their directors. The acts of these agents, in all matters pertaining to the proper business they are appointed to transact, should bind their principals, unless contrary to restrictions of their powers, brought to the knowledge of those with whom they deal.

It is argued that, inasmuch as by the restrictions imposed on the power of the agent by custom, as well as by the rules of the company, he can make no change in the printed conditions of the policy, therefore he had no authority to waive a forfeiture of such terms, or dispense with their performance. Without determining whether this could be done by agreement at the time the policy was issued, we are clearly of the opinion that such restriction of authority in no way affects his power so to do after the policy is issued, in a proper case, and without fraud on his part, or by the assured

The distinctions between omitting a condition required by the terms of his authority and by custom, to be introduced into the policy, and the waiver of such condition for a proper cause, after the policy had been executed, are obvious.

It has been held that an agent intrusted with blank policies, to be filled up and countersigned by him, may bind the underwriter by new clauses or conditions inserted by the agent before issuing the policy. 2 Phillips' Ins. 528, No. 1877; Gloucester Manufacturing Co. v. Howard, 5 Gray, 497.

By the terms of the policy the underwriters reserved the right to cancel it upon the risk being increased, or for any other cause, "by paying to the assured the unexpired premium, pro rata." The point is made by the plaintiff, that if the risk be increased, of which the underwriters have notice, and the right to cancel is not exercised, this amounts to a waiver of the forfeiture incident to a breach of the condition against increase of risk. The decision of this question is not necessary, as the case is determined without it. But, for myself, I am free to admit

the force of the position, in view of the peculiar facts of the case, and that I believe it is supported by sound reason. * * *

It is argued by the defendant's counsel, that the waiver of the breach of the condition of the policy, on account of the rustic window-shade manufactory, extended only to the acts in violation of the terms of the policy done before such alleged waiver, and that the condition continued to be daily violated by the continuance of the cause of the increase of risk; and that, as it is not pretended that there was any waiver of the breaches resulting therefrom, the policy is thereby avoided. The error of this argument is apparent. The waiver extended to all breaches resulting from the manufacture of rustic window-shades in the building insured, and the parties in all their intercourse concerning the increase of the risk, and by their acts touching the same, had reference to the continuation of the manufactory, and of course contemplated the waiver of the breaches resulting therefrom, and the dispensation of the conditions of the policy prohibiting it.

The policy expressly prohibited the keeping of benzine upon the premises insured. There was evidence tending to prove that this fluid was necessary in the preparation of the paints and varnishes used in the manufacture of rustic window-shades, and that, at the time of the fire, it was kept for that purpose upon the premises, in tin cans, in quantities, not exceeding two gallons. The evidence also tended to prove that the agent gave permission for keeping benzine for the purposes and in the manner and quantities aforesaid. This permission was given, as it is claimed, at the time the alleged consent was given to the continuation of the window-shade manufactory. The court instructed the jury, substantially, that a consent to the occupation of the building for the manufactory implied a consent to the use of such articles as were necessary to be used in the business. This instruction was clearly correct. The consent to the manufacture of the window-shades implied a consent to the use of benzine if it was necessary or commonly used in making those articles; other-

wise a direct permission to continue the manufactory would be defeated by the prohibition in the policy.

This permission operated to dispense with the prohibition. * * *

The evidence tended to prove that the agent of the underwriters, at the time he made an examination of the building, directed a certain iron door to be put up, and that either the tenants or the agent of the plaintiff agree to comply with this requirement. It seems that no time was specified in which it should be done. An order was given for the door, but it was not completed and put up at the time of the fire. Upon this evidence are based the sixth and seventh interrogatories to the jury by the defendant, and the fifth propounded by the court.

The special finding in response to the sixth question of defendant, while it makes the continuance of the insurance conditional upon the door being put in, fixes no time when it was to be done. It simply shows that the agent agreed to carry the risk if an iron door should be put in. The agreement to put in the door was not a condition precedent to the continuance of the insurance. Of course the plaintiff had a reasonable time in which to comply with his agreement, and the response to the fifth question shows that he had used all reasonable efforts to do so before the fire, and had, therefore, sufficiently complied with his part of the agreement. These findings are consistent with each other, and not inconsistent with the general verdict. Plaintiff's motion to set aside the finding upon the sixth question of defendant was properly overruled.

In the light of the doctrines above announced, we find no error in the rulings of the court upon the admission of evidence and the submission of questions to the jury for special findings. It is not necessary to state the special questions raised, or evidence admitted or excluded. Neither do we find error in the giving or refusal to give instructions asked by the parties. Those given are in harmony with the principles of this opinion; those refused are not. It would answer no useful purpose to refer to them more

fully. The verdict, as well as the special findings, are well supported by the evidence. The motions to set them aside were properly overruled. Affirmed.

FARMERS' MUTUAL INSURANCE CO. v. NEW HOLLAND TURNPIKE CO.

Supreme Court of Pennsylvania, 1888. 122 Pa. St. 37.

Insurable Interest.

Green, J. * * * The more important question * * * is whether the turnpike company had any insurable interest in the bridge. It is a novel question, but perhaps not difficult of solution. The basis, upon which the insurable interest is claimed to exist, is the fact that the turnpike company contributed $5,500 to the cost of erecting the bridge, being one-third its total cost, $16,500. If this contribution was compulsory—that is, legally compulsory—it would perhaps have to be admitted that an interest in the bridge, legal or equitable, would necessarily flow from it. For it cannot be supposed that the law would oblige any person or corporation to contribute directly to the cost of erecting a structure, without conferring an interest in the structure which the law would recognize and enforce. While saying this, we do not of course refer to that kind of contribution which is accomplished by the payment of taxes. Such contribution is, of course, for public use, and confers no title or interest upon the tax-payer in structures which may be erected with public funds. But in this case there is no pretense of any compulsion upon the turnpike company. The evidence as to the payment of the money is barren of information except as to the mere fact of the payment.

There is absolutely no testimony to prove why or upon what consideration, or for what purpose or reason, the turnpike company paid any part of the cost of erecting

the bridge. It is not difficult to imagine a reason, since, as the company's road crossed the stream over which the bridge was erected, it would be quite desirable for them to have a bridge over which persons using the road could travel. But while that might be a reason for the company building a bridge for its own, it was still the fact that the bridge was a public county bridge, free to all travel, built many years before by a private person who transferred it to the county, and hence the property of the county exclusively. Being thus a free, public bridge, there could not possibly be any private estate of ownership in it. The turnpike company could charge no tolls for passing over it. They could exercise no acts of ownership over it. They could not obstruct it nor take it down, even if to rebuild it, without the consent of the county, and perhaps not even with such consent, as it was a part of the public highway.

In point of fact, while the turnpike company did contribute the third part of the cost of its erection, after the former bridge had fallen down, the county at that time paid the other two-thirds of the cost, and re-erected the bridge in discharge of its undoubted legal obligation to do so. And so, after its destruction by fire in 1882, it was again rebuilt by the county as a public county bridge in obedience to a general law of this Commonwealth, Act of May 5, 1876, P. L. 112, and the decree of this court: Myers v. Commonwealth, 110 Pa. 217. All this was done without any cost to this plaintiff, who now enjoys the use of the bridge in the same manner and to the same extent as before the fire. The only injury the plaintiff has sustained by the fire is in being deprived of the use of the bridge, not as its own, but as a part of the public highway, during the period of the reconstruction of the bridge. But for that injury the defendant was not responsible in any sense, and it never assumed an obligation to make compensation for it. The county was legally charged with the duty of rebuilding, and however an argument might be made against the county for not performing its duty in that regard with promptness, it is perfectly manifest

that the breach of that duty by the county conferred no right of action against the defendant insurance company. What then remains to impose any liability upon the defendant? The bridge is restored without any expense to the plaintiff. Every right which the plaintiff enjoyed before the fire is enjoyed since, so far as the bridge is concerned, without any additional cost to the plaintiff. It may be remarked in passing that the right of the plaintiff in the bridge is only the public and common right of its patrons as citizens, to use the bridge as a part of the public highway. It is therefore not a right peculiar to the plaintiff in any sense.

There was clearly no interest in the bridge belonging to the turnpike company which could be recognized or enforced either at law or in equity. There could not be any right of property of any kind, nor of possession, nor of custody. Even the use of it was not a use by the plaintiff in its corporation capacity, but a mere right of passage over it which belonged to all citizens in common. The money which was contributed to its construction by the plaintiff was a mere gratuity, which is was not bound to give and which it could never recover. In such circumstances there was no interest or property in the bridge as a structure and hence no insurable interest capable of protection and enforcement. * * * Judgment reversed.

ZIMMERMAN v. FARMERS' INS. CO.

Supreme Court of Iowa, Dec. 21, 1888. 76 Ia. 352, 41 N. W. 39.

Insurable Interest, Husband and Wife.

Action at law on a policy of insurance issued by defendant, the Farmers' Insurance Company of Cedar Rapids, to recover the value of a building destroyed by fire. There was a trial to the court, and a judgment in favor of plaintiff. The defendant appeals.

Robinson, J. The policy upon which this action was brought on its face insures "C. Zimmerman, Esq.," against loss or damage by fire, to the amount of $3,000, on a frame dwelling-house, which was destroyed by fire during the life of the policy. It makes the application for insurance, as set out in a copy thereon indorsed, a part of the contract of insurance. The copy shows that the application was in the name of Conrad Zimmerman, and recites that the dwelling was occupied by a tenant; that the applicant was the sole and undisputed owner of the property insured, and of the land upon which it was situated; and that it was not incumbered. The statements as to occupancy and title of the property insured were warranted to be true. The application was signed. "By agent, C. Zimmerman, applicant." The answer admits the issuing of the policy in suit, and the destruction of the dwelling-house therein described, but alleges that defendant is not liable for its loss, for the following reasons: (1) The contract of insurance was made with and delivered to Conrad Zimmerman in his name, and insured him alone, while the property destroyed belonged to his wife, Caroline, who is plaintiff in this action, (2) The policy, by virtue of its conditions, was void by reason of the following facts: The title was not as stated in the application. The property was represented to be free from incumbrance, although there was a mortgage thereon of $900. The house was vacant when the policy was issued, and also when the loss occurred. Plaintiff, in her reply, alleges that these facts, relied upon by defendant in defense of its action, were fully known by defendant when the application for insurance was made, and when the policy issued; that they were disclosed to the agent of defendant, who wrote out the application of plaintiff, but who failed to state all the facts therein; that plaintiff had no knowledge of the errors in the application, nor of the fact that her name was written in the policy as "C. Zimmerman, Esq." The court below found the facts to be substantially as claimed by plaintiff, and found, as conclusion of law, that the agent of defendant, having been fully advised as to the truth of all matters pleaded in defense when the contract of

insurance was made, is now estopped from availing itself of the false statements of the application to defeat a recovery in this action.

1. Appellant claims error on the part of the court below in finding that the real plaintiff is Caroline, and not Conrad, Zimmerman. The original petition did not disclose the full first name of the plaintiff therein, but all personal pronouns therein used, and referring to the plaintiff, were of the masculine gender. But the petition was verified by C. Zimmerman, as agent for C. Zimmerman, and the verification recited that the person making it was better acquainted with the facts of the case "than the plaintiff herself." In an amendment to the answer filed on the day of trial, defendant admitted, in effect, that the plaintiff was Caroline Zimmerman, and in subsequent pleadings that fact was fully admitted. Therefore the finding of the court in question was correct.

2. It is insisted by appellant that plaintiff cannot recover on the policy in suit in an action at law, for the reason that it was issued, not to plaintiff, but to her husband, and it is conceded that he has no beneficial interest in the policy. But it is urged by appellee that the contract of insurance is not in fact represented by the policy in suit, and the alleged application, a copy of which is thereon indorsed, but that it was partly oral and partly in writing. The district court found that the application was not in writing, but verbal. It is conceded that the original paper, a copy of whch is indorsed on the policy as a copy of the application for insurance, was written by the agent of defendant, who solicited the insurance, and that the signature thereto was appended by him. Some of the evidence tends to show that it was wholly written in the absence of the husband of plaintiff, but from information he had given as agent of his wife. It is contended by appellee that the alleged copy of the application indorsed on the policy should be disregarded, and the policy and the verbal application alone considered in determining what was the contract of insurance; that the policy and the verbal application together show that the insurance was for the benefit of plaintiff, and that the policy was issued to the husband as agent for his wife, on her

property, and for her use and benefit. It appears that the policy was not examined by either the plaintiff or her husband until after the property was destroyed, and this fact is relied upon by appellee in aid of her claims. The theory of a contract, partly oral and partly in writing, now urged by appellee, does not seem to have been pressed in the court below, although it is suggested in the special findings of fact made by the court. The petition is founded upon the policy, which was expressly adopted by plaintiff as alleged in an amendment to her peition filed after the trial was concluded. The theory of her pleadings was that although the application, as shown by the policy, did not correctly represent the facts, yet defendant was estopped from asserting them by reason of its knowledge of their existence when the policy was issued. The policy contains this provision: "(1) The application of even number herewith, a copy of which is indorsed hereon, shall be considered as part of this contract and a warranty by the assured." The contract of insurance plainly includes the policy itself and the application therein referred to. The policy was issued to "C. Zimmerman, Esq.," evidently not to plaintiff. The application referred to was by "Conrad Zimmerman." Neither instrument contains any hint of trusteeship or agency. The two together constitute a contract of insurance with Conrad Zimmerman, and in its present form plaintiff cannot maintain an action at law thereon. Baldwin v. Insurance Co., 60 Iowa, 497, 15 N. W. Rep. 300; Williams v. Insurance Co., 24 Fed. Rep. 625; Bank v. Insurance Co., 29 Conn. 378. See, also, Fuller v. Insurance Co., 61 Iowa, 350, 16 N. W. Rep. 273. This case is distinguishable from cases in which the assured had in fact an insurable interest, as was true in Shaw v. Insurance Co., 49 Mo. 578. It is also distinguishable from those in which the insurance company seeks to defeat a contract of insurance otherwise valid, by showing facts of which it had full knowledge when the contract was entered into, as that the condition, occupancy, and incumbrance of the property were not as represented in the application. Boetcher v. Insurance Co., 47 Iowa, 253. The conclusion we have reached renders

a further consideration of the questions presented by appellant unnecessary. The judgment of the district court is reversed.

EQUITABLE FIRE INS. CO., Appellants, v. QUINN, Respondent.

Queen's Bench, in Appeal, District of Quebec, 1861. 11 Lower Canada, 170.

Market Value.

Before Sir L. H. LaFontaine, C. J., Aylwin, Duval, Meredith and Mondelet JJ.

In this case, the respondent, plaintiff in the court below, obtained judgment against the appellants for the sum of £200, being the amount insured by them on his stock and utensils in trade as a general turner.

The principal matters of fact in the plaintiff's declaration were admitted, including the making of the policy, the amount insured thereby, the renewal thereof, and a loss by fire while the policy was in force; but not admitting the quantity and value of the articles insured by the policy. The quantity and value were, however, established by the respondent's witnesses. By the policy, the appellants agreed to pay or make good to the insured all such loss or damage as the said insured should suffer by fire. The loss and damage which he had suffered, the respondent contended, was the value of the blocks in the market. The appellants, on the contrary, contended that they were only liable to the respondent for the cost of the effects, inasmuch as the respondent had not effected insurance upon the profits he expected to make upon his goods. A number of witnesses were produced by the appellants who established the cost of the articles insured at a considerably lower amount than the value proved by the respondent. The appellants, in consequence, tendered the sum of one hundred pounds with interest and costs to the party insured, who refused to accept

the offer, and the present appeal was in consequence instituted.

Meredith, J. The action in the court below was founded upon a policy of insurance by which the plaintiff, a blockmaker by trade, insured his stock in trade, consisting of blocks, for £200. The property insured having been destroyed by fire, the present action was brought for the recovery of the insurance; and the only question between the parties is as to the value of the blocks destroyed. The defendants contend that the plaintiff is not entitled to more than the amount which it cost the plaintiff to manufacture the blocks in question; but this pretension cannot, I think, be maintained. The plaintiff is entitled to what the blocks were worth in the market, at the time they were burned; and I think, according to the evidence, they were worth the amount the plaintiff had insured upon them, namely £200, that being the amount of the judgment in favor of the plaintiff; and therefore that that judgment ought to be confirmed.

Duval, J. The judgment of the court below should, in my opinion, be confirmed, inasmuch as both the English and French law, on this point, declare that the amount covered by the insurance is the actual loss, without any reference to the cost price; and this is what the court now grants.

The judgment of the court below was therefore confirmed.

LAURENT VS. CHATCHAM FIRE INSURANCE CO.

Superior Court of the City of New York. 1828. 1 Hall 41.

Amount of Insured Interest.

The policy of insurance in this case covered a building owned by the insured, but situated upon leased ground. The lease would expire within 15 days after the fire, and there were no provisions for renewing it. The building was worth about $1,000, but if sold for the purpose of being removed from the premises, it is not worth to exceed $200. The ques-

tion involved in the case was the amount of plaintiff's insurable interest, it being admitted that he had no interest in the lot except for a period of 15 days. There were vacant lots in the immediate vicinity of the lot upon which the insured building was situated.

The trial court instructed the jury that the plaintiff was entitled to recover the full intrinsic value of the building. The superior court held:—"It is the tenement upon which the insurance is made; and the actual value of it as a building is the loss of the insured in case of its destruction by fire. To that measure of indemnity the proprietor is entitled, however unproductive the property may be, and he is entitled to no more, whatever he may have derived from the tenement. * * * It is of no importance whether the tenement stands upon free-hold or upon leased ground, or whether the lease is about to expire or has the full time to run when the fire occurs, or whether it is renewable or not. The conditions of the policy are satisfied, as the title and ownership are in the insured at the time of the insurance, and at the time of the loss, and the measure of his indemnity is the amount of his interest in the tenement when destroyed by the fire, notwithstanding that the whole interest would have expired the very next day, or soon after the loss occurred.

BROWN v. COTTON & WOOLEN MANUF'RS' MUT. INS. CO. OF NEW ENGLAND.

Supreme Judicial Court of Massachusetts. Suffolk. June 23, 1892. 156 Mass. 587.

Alienation.

Holmes, J. This is an action on a policy of insurance against fire, issued by the defendant, a Massachusetts company, in 1885, upon the plaintiff's woolen factory in Connecticut. So far as material, the policy was in the Massachusetts standard form, with a rider. Pub. St. c. 119,

§ 139. At the trial the judge directed a verdict for the defendant, and reported the case to this court. When the policy was issued the plaintiff had the legal title, probably as mortgagee in equity by conveyance from her husband through a third person. We assume her title to have been sufficient, without discussion. The defenses relied on are that before the fire she had broken the condition against sale, that she no longer had an insurable interest, and that she had broken the condition against the factory ceasing operation for more than 30 days. It also is set up that the plaintiff had not rendered a statement in writing setting forth the value of the property insured, etc., as required by the policy. The plaintiff replies to this last defense that it was waived, and we shall give it no consideration. For the purposes of our decision, we assume that, if it had stood alone, the plaintiff, at least, would have had a right to go to the jury.

The sale relied on was a conveyance by the plaintiff, four days before the fire, to the trustee in insolvency of her husband's estate, by a deed which purported to be for valuable consideration, but for which the plaintiff testified that she received nothing. The plaintiff proved against her husband's estate, and her claim was allowed, but she received nothing upon it. It is argued that her position as a creditor preserved for her an insurable interest in the factory after the transfer, and that the conveyance was not a sale.

In the opinion of a majority of the court, the conveyance was a breach of condition. We are of opinion, in the first place, that it makes no difference whether the consideration of the conveyance is of substantial value, or is merely the technical consideration which is said to be imported by the execution of a deed. If the plaintiff's conveyance was in other respects a breach of the condition, the fact that she received nothing for it will not save it. Essex Sav. Bank v. Meriden Fire Ins. Co., 57 Conn. 335, 338, 17 Atl. Rep. 930, and 18 Atl. Rep. 324.

But it is said that the plaintiff did not alienate her whole interest, because she retained an insurable interest after the transfer, as one of the creditors for whom her grantee held

the property in trust. We will assume that it is true that a creditor has an insurable interest in the estate of his debtor when conveyed to an assignee in insolvency. Eastern Railroad Co. v. Relief Fire Ins. Co., 98 Mass. 420, 423; Rohrback v. Insurance Co., 62 N. Y., 47, 58. But we think that an interest of that kind would not be a continuation of the former interest of the plaintiff. By her conveyance the plaintiff parted with the whole legal title, and, as her grantee already owned her husband's equity, she extinguished her mortgage. In whatever words we express the fact, she put an end to her preferred right to satisfy her debt out of this land before other creditors could touch it. Her right afterwards was not created by, or reserved or excepted out of, her conveyance. It arose from the independent circumstance that her grantee was an assignee in insolvency, and that the land became part of the fund held by him as such. It was a right in common with other creditors to share in the fund, and in the land only in so far as it was part of the fund. We are of opinion that the condition against sale was broken. Dadmun Manuf'g Co. v. Worcester Mut. Fire Ins. Co., 11 Metc. (Mass.) 429, 435; Oakes v. Insurance Co., 131 Mass. 164, 165; Dailey v. Insurance Co., 131 Mass. 173; Grevemeyer v. Insurance Co., 62 Pa. St. 340, 342; Adams v. Insurance Co., 29 Me. 292, 296, 297; Hazard v. Insurance Co., 7 R. I. 429. See, further, Young v. Insurance Co., 14 Gray, 150, 152, 153. We express no opinion whether there was a breach of the condition against the factory ceasing operation.

Judgment on the verdict.

COMMERCIAL UNION ASSUR. CO., Limited, OF LONDON, ENG., v. NORWOOD et al.

Supreme Court of Kansas. Jan. 8, 1897. 57 Kansas 610.

Other Insurance. Stipulation.

This action was brought by O. F. & E. R. Norwood, partners, against the Commercial Union Assurance Company, Limited, of London, England, on a $2,500 policy of insurance on a stock of merchandise in Larned, Kan. Attached to the plaintiff's petition is a copy of the policy, which contains this provision: "This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." A copy of the proofs of loss furnished by the plaintiffs to the defendant was also attached to the petition, from which it appears that a slip was attached to the policy, reading as follows: "$32,500 additional insurance allowed in form and concurrent herewith. This slip is attached to and forms a part of policy No. 100,115 of the Commercial Union Assurance Company of London, England. Larned, Kansas, Nov., 189—. J. H. Ormandy. Agent." The proofs also show that at the time of the fire there was other insurance on the property to the amount of $35,800, under 13 policies issued by other companies at various dates from October 1, 1892, to January 26, 1893. The property was totally destroyed by fire on the 7th of February, 1892. The defendant answered, alleging for a third defense that the policy contained the provision above copied, and averred that the amount of concurrent insurance was expressly limited by the indorsement on the policy to $32,500; that the plaintiffs procured other insurance in excess of the amount permitted, and that the policy was thereby rendered void. To this answer the plaintiff replied: "That they contracted with the agent of the defendant, authorized by the defendant so to contract, for said insur-

ance, under a statement and agreement made at the time and concurrent with said contract, and a part thereof, that the total insurance, including the policy issued by the defendant, upon the property insured, of the plaintiffs, should amount in the aggregate to the sum of $40,000; and that the policy of the defendant to be issued to the plaintiffs should contain an agreement for such additional and concurrent insurance as that the policy to be issued by the defendant would amount in the aggregate to the sum of $40,000; and that thereafter, and upon the receipt of said policy, the plaintiffs, relying upon said contract and agreement so made as aforesaid, received and accepted said policy from the defendant upon the belief that said agreement had been fully carried out, and that said policy permitted concurrent and additional insurance so as aforesaid agreed upon; and, so relying on such contract and agreement, the plaintiffs wholly neglected and failed to read said policy until after the occurrence of the fire which destroyed the property covered thereby. That by reason thereof, and of the facts aforesaid, the defendant ought not now to be permitted to assert as a defense in this action the facts set forth in the third defense contained in said answer, for that it is estopped to deny its liability on the grounds and for the reasons therein stated." The defendant demurred to this part of the reply, which demurrer was overruled. The case was tried to a jury. O. F. Norwood, one of the plaintiffs, testified that in the fall of 1890 he purchased the stock of goods, and made arrangements with Mr. Ormandy and Mr. Charles for insurance on them to the amount of $40,000, and that he took out policies to that amount running for one year. "Q. This policy is dated 21st of November, 1891. Prior to that time, what, if any, talk had you with Mr. Ormandy—this same man who signed this policy—as to insurance from that fall on, or from the time your other policies expired which had been taken out in 1890? A. Mr. Ormandy came into the store, and wanted to know about the insurance. He came into the store, and wanted to know if he could have the insurance again; and I told him he could; and I wanted permission to carry $40,000 of insurance on the stock. Q.

What further was said about how much he was to carry, or how much any one else was to carry? A. I asked him then, after Smith had been there to see me—I asked him whether we had better let Smith have 10,000, and he said, 'Very well, let him have 10,000.' Q. What amount did he say he would take, if any? A. 30,000. Q. What arrangement, if any, was made as to how these policies were to be issued by him? A. I told him I wanted him to scatter them out, so as not to let the premiums all come due at once. I told him I wanted the premiums to come due in, say two, three, and four weeks, such like, so I wouldn't have the premiums to pay all at once. Q. You may state if he delivered you any policy of insurance afterward. A. Yes, sir; he did. Q. State from whom you received this policy in suit. A. J. H. Ormandy. Q. You may state whether at the time you received it you read its terms and conditions or not. A. I did not. Q. You may state what you did with it when you received it. A. I put it in the safe with some others that I had there. * * * Q. When you told Mr. Ormandy that you wanted $40,000 of insurance for the succeeding year, in the fall of 1891, what did he say about writing that much insurance on the stock? A. He said that we could have it; that he would make the policies out to that effect; that we should be permitted to carry the $40,000 on the stock. Q. You may state if you knew, at the time you received this policy, that the policy, by its terms, limited the concurrent insurance to $32,500. A. No, sir; I did not." He further testified that he had no further conversation with Ormandy with reference to the amount of insurance, and that Ormandy brought in the policies from time to time, and that he thought he got 10 policies through him. The jury were instructed that if they found that Ormandy was the general agent of the company, and that the plaintiffs had no notice of any limitation on his authority; "that if the said Ormandy agreed with the plaintiffs to issue to them policies of insurance to the extent of $30,000 upon the property covered by the policy in controversy, and that such policies should show the right to have the total insurance upon such property to the amount

of $40,000; and if you should further find that pursuant to such agreement the policy in question was issued, and that plaintiffs received the same without knowledge of the fact that the additional insurance provided therein was limited to an amount much less than the amount of insurance upon said property; and that they, relying on said agreement, received said policy, and paid the defendant, through its said agent, Ormandy, the premium charged,—then, and in such case, you are instructed that the fact that there was $37,500 of a total insurance upon the property covered by said policy would not avoid said policy, notwithstanding the conditions therein contained." The jury rendered a general verdict in favor of the plaintiffs for the full amount of the policy, and also returned answers to special questions, finding, among other things, that the value of the goods destroyed was $50,000, and that the total amount of insurance at the time of the fire was $38,300. Judgment was entered on the verdict, and the defendant brings the case to this court.

Allen, J. (After stating the facts). The pleadings, evidence, and instructions in this case squarely present the question whether a prior parol agreement, made with the general agent of an insurance company, concerning the amount of concurrent insurance to be carried on the property insured, controls and defeats the express terms of the policy. It appears without dispute, that one of the conditions of the policy was that it should be void if the insured should procure any other insurance on the property without the consent of the insurer, and that consent was indorsed on the policy for $32,500 only, of concurrent insurance. The prior parol agreement with Ormandy, with reference to the total amount of insurance to be carried on the property, and the fact that the plaintiffs had neglected to read the policy before the fire, are alone relied on to avoid the condition above mentioned. There is no more wholesome or well-settled rule of law than that parol evidence of prior or contemporaneous conversations, and oral agreements, is inadmissible to contradict or vary the terms of a written contract. Drake v. Dodsworth, 4 Kan. 159; Cornell

v. Railway Co., 25 Kan. 613; Brenner v. Luth, 28 Kan. 581; Hopkins v. Railway Co., 29 Kan. 544; Windmill Co. v. Piercy, 41 Kan. 763, 21 Pac. 793; Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017; Lock Co. v. Huston, 55 Kan. 104, 39 Pac. 1035. Provisions in policies of insurance providing that the policies shall be void if other insurance be taken without the consent of the insurer, are valid. 2 May, Ins. § 364. And subsequent insurance, taken out without the consent, either expressed or implied, of the insurer, avoids the policy. Allen v. Insurance Co., 31 Am. Rep. 243; Funke v. Association, 29 Minn. 347, 13 N. W. 164; Bard v. Insurance Co., 153 Pa. St. 257, 25 Atl. 1124. And taking insurance in excess of the amount consented to avoids the policy. Allen v. Insurance Co., 123 N. Y. 6, 25 N. E. 309; Union Nat. Bank v. German Ins. Co., 18 C. C. A. 203, 71 Fed. 475. Counsel for the defendant in error do not question these propositions, but they insist that the company had notice of the intention to take out insurance to the amount of $40,000, and expressly assented thereto; and that it is estopped from denying liability by the parol agreement made with Ormandy, as agent. The cases of Insurance Co. v. McLanathan, 11 Kan. 549; Insurance Co. v. Pearce, 39 Kan. 396, 18 Pac. 291; Insurance Co. v. Wood, 47 Kan. 521, 28 Pac. 167; and numerous other cases, decided by courts of other states,— are cited in support of this position. We are entirely satisfied with the law as declared in all the cases heretofore decided by this court cited on behalf of the defendants in error. The difficulty in this case is that there is no proof, either of the existence of insurance on the property in excess of the amount authorized at the time the policy was issued, or that the company, or its agent, was informed at any time before the fire of the full amount of insurance taken out. It appears that of the policies mentioned in the proofs of loss five policies, aggregating $17,300, were issued prior to the one sued on; that another, for $2,500, was issued on the same day; and that all the others bear date subsequent to the one issued by the defendant. Although it is shown that the plaintiffs had carried $40,000 insurance during the preceding year, it no-

where appears from the evidence whether the whole or any part of the old insurance was still in force when this policy was issued. It was incumbent on the plaintiffs, when seeking to charge the insurance company with knowledge that the property was insured, at the time the policy was issued, to an amount exceeding that authorized by the consent indorsed on it, to prove the fact. This was not done, and, so far as we are informed by the evidence in the record, the whole amount of concurrent insurance, at the time this policy was issued, was $19,800. Although Norwood testified that he got ten policies from Ormandy, the agent of the defendant, it does not definitely appear that the last one received from him rendered the whole amount of insurance on the property more than $35,000. It cannot be said, then, that at the time the policy was issued either the company or its agent, Ormandy, had notice of the existence of so much insurance as would avoid the policy; nor can it be said that at any subseqquent time Ormandy knew that the condition of the policy had been violated, and received, or even retained, the premium paid on it. There is, therefore, no element of estoppel in the case. The plaintiffs rested on the bare proposition that Ormandy had verbally agreed, prior to the date of the policy, that there should be $40,000 insurance on the property. Afterwards, when the written contract was made, the total insurance was limited to $35,000. Do the prior parol negotiations control, or the subsequent written contract? Undoubtedly the latter.

We have carefully considered the case of Insurance Co. v. Norwood, 69 Fed. 71, 16 C. C. A. 136, which arose on one of the policies of insurance on this same stock of goods, issued on the 5th of November, 1891. We find ourselves unable to concur in the conclusion reached by that eminent court that "by delivering the policies with knowledge, through their agent, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up after a loss." We think there is a clear distinction between a case where there is knowledge of the existence of a fact which would avoid the policy and this, in which it is merely claimed that

there was a prior agreement, contradicting the terms of the written contract, as to the amount of insurance the party should be permitted to carry. We are better satisfied with the reasoning of Judge Sanborn in his dissenting opinion, than with the views of the majority of the court.

In the case of Union Nat. Bank v. German Ins. Co., 71 Fed. 473, 18 C. C. A. 203, it was held that "parol negotiations leading up to a written contract of insurance are merged in the contract, which cannot be controlled by parol evidence of the understanding of the parties." If it were claimed that the indorsement on the policy was a mistake, under proper averments and proof it might have been corrected, and the policies enforced according to the real agreement and intent of the parties. But no such claim is made in this case. The plaintiffs maintained from first to last that the prior parol agreement overturned the written contract on which they based their suit. This position is untenable. The judgment is reversed, and a new trial ordered. All the justices concurring.

SCOTT v. QUEBEC FIRE ASSURANCE COMPANY.

King's Bench for the District of Quebec, 1812. Stuart, Low. Can. 147.

Condition of Premises.

On August 21, 1820, the plaintiff insured the sum of £2,600 at the office of the Quebec Fire Assurance Company, upon a house which he inhabited in Montreal, and upon the goods and merchandise, furniture, plate, etc., which it contained, all of which were consumed by the fire on August 15, 1821, while the policy was in full force. It was proved that the fire began in an adjoining house, and spread from thence to a wooden building on the premises of the plaintiff, from which it was communicated through a doorway of the dwelling-house, which was open although it had an iron door, to the

interior of the last-mentioned edifice, and that it broke out between eight and nine o'clock in the evening. In the policy of insurance it was stated "that the dwelling-house of the assured was built of stone and covered with tin, gables through the roof and plafond, iron doors and shutters, and for the defendants it was contended, that these words "iron shutters and doors" amounted in law to a warranty, which according to the facts above stated had not be performed.

Sewell, C. J. The rule as to contracts in general is to give language its true effect according to the intention of the speaker or writer, as inferred from the whole expressions and the nature of the occasion to which they are applied. And policies of insurance are to be construed by the same rules as other instruments, unless where by the known usage of trade certain words have acquired a peculiar sense distinct from their ordinary and popular sense. In this case the description of the premises which was furnished by the insured is inserted in the policy, and if in point of fact it be true, as it undoubtedly is, that they were "built of stone and covered with tin," had "gables through the roof and plafond, iron doors and shutters," whether we consider these expressions in the policy as a representation, or as a warranty, is immaterial. For, in either instance, the express contract of the assured has been substantially and strictly performed, and being an express contract there is no room for implication: expressum facit cessare tacitum. The doors and windows being open in the middle of August, at half-past eight o'clock is no proof of negligence.

Judgment for the plaintiff.

NATIONAL FIRE INS. CO. v. J. W. CARAWAY & CO. et al.

Court of Civil Appeals of Texas. May 2, 1910. Rehearing Denied June 2, 1910. 130 S. W. 458.

Failure to Keep Inventory in Iron Safe.

Pleasants, C. J. This suit was brought by the appellees to recover upon two fire insurance policies issued by appellant on the 31st of August, 1906, and the 9th of March, 1907, respectively, upon a stock of goods and merchandise owned by appellees and which was destroyed by fire on August 5, 1907. The petition alleges, in substance: That the first of said policies, same being for the sum of $1,000 was issued by the appellant upon a stock of goods and merchandise owned by R. A. Rushing and situated in the storehouse of said Rushing in the town of Joaquin, Tex.; that on the 7th day of March, 1907, appellees Caraway & Co. purchased said goods and merchandise from Rushing, and with the consent of appellant said policy was transferred and assigned to appellee firm; that on the 9th day of March appellant issued the second policy before mentioned, which was also for the sum of $1,000 and was upon said stock of goods and merchandise; that said property, which was of the value of $12,000, was destroyed by a fire on August 5, 1907, which destroyed the building in said town of Joaquin in which said mercantile business was being conducted; and that appellees had made proof of loss as required by the terms of said policies. The answer of the defendant admits the issuance of the policies as alleged in the petition and the destruction of the property by fire on August 5, 1907, but claims that it is exempt from liability by reason of the breach by appellees of the covenants of warranty contained in said policies. The covenants of warranty so pleaded by appellant are as follows:

"The following covenant is hereby made a part of this policy and a warranty on the part of the assured:

"Section 1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year;

and unless such inventory has been taken within twelve calendar months prior to the date of this policy, and is on hand at the date of this policy, one shall be taken complete in detail within thirty days after the date of this policy, or this entire policy shall be null and void from such date.

"Sec. 2. The assured will make and prepare, in regular course of business, from and after the date of this policy, a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and on credit, or this entire policy shall be null and void. By the term 'complete record of business transacted' as used above, is meant a complete record of all the property which shall go into the premises and be added to the stock, and of all property taken from the stock, whether by the assured or by others, even though not technically purchasers or technically sales. If the business of the assured under this policy shall be that of manufacturing, then this complete record must in addition show all the raw material received and all products manufactured therefrom, including the cost of manufacture; and must show all waste in process of manufacture; and must show all the raw material and manufactured property which is taken from the building described, or this entire policy shall be null and void.

"Sec. 3. The assured will keep and preserve all inventories of stock taken during the current calendar year, and also all those taken during the preceding calendar year, which are on hand when this policy is issued, and will keep and preserve all books which are then on hand, showing a record of business transacted during the current calendar year and the preceding calendar year. The assured will also keep and preserve all inventories taken after the issuance of this policy, and all books made and prepared after the issuance thereof, showing record of business transacted. The books and inventories, and each of the same, shall be by the assured kept securely locked in a fireproof safe at night and at all times when the building mentioned in the policy is not actually open for business; or, failing in this, the assured shall keep such books and inventories, and each of them, in some secure

place not exposed to a fire which would destroy said building; and in the event of a loss by fire to the personal property mentioned herein, said books and inventories, and each of the same must be by the assured delivered to this company for examination, or this entire policy shall be null and void, and no suit or action shall be maintained thereon for any such loss. It is understood and agreed that this clause and the requirement thereof is one of the inducing causes to the acceptance of the risk herein assumed and the issuance of this policy, and that the terms and requirements hereof are material to the risk, and to this insurance, and to any fire loss happening to the property described in this policy."

It is averred that appellees failed to prepare and keep said inventories and books as provided in said policies and failed to produce same for the inspection of appellant after the fire, and therefore, by the express terms of the policies, they have become void, and no recovery can be had theron. Defendant further pleaded that by the terms of said policies they became void if plaintiff procured any additional insurance on the property without the consent of the defendant, and that this covenant of warranty was breached by plaintiffs, and said policies were therefore void, and no recovery could be had thereon. The plaintiffs by supplemental petition denied the averments of defendant's answer and alleged that they had fully complied with all of the agreements and covenants contained in said policies. The cause was tried in the court below with a jury, and a verdict returned and judgment rendered in favor of plaintiffs for the sum of $1,643.29.

The evidence shows that the policies were issued as alleged, and that they contained the covenants and agreements pleaded by the defendant. The policy issued to Rushing was with the consent of appellant transferred to appellees on March 7, 1907. The fire which destroyed the property occurred during the night of August 5, 1907, at a time when the store was not open for business. An inventory of the stock was taken by Rushing on January 1, 1907, and was turned over to appellees when they purchased the property and business. Appellees took no inventory until August 1, 1907, and the inventory which they began to take on that day was not completed at

the time of the fire. This partial inventory showed that the value of the stock on hand at the time of the fire exceeded the amount of the insurance thereon. The only inventory produced by appellees was the incomplete one, begun on August 1, 1907. In regard to his failure to produce the Rushing inventory after the fire, plaintiff J. W. Caraway testified: "The agent asked me for this Rushing inventory, and I told him I didn't have it. I told him it was destroyed or lost, or something; that I didn't have it. I told him it was in the safe the last time I saw it, but I didn't know whether it was destroyed by fire or in some other way, but it was lost and I didn't have it. I went over this matter with that agent some two or three hours. He went through all my books, and I reckon he saw everything he wanted to. He went through the books and figured on it, and he says: 'I can't make a settlement with you, you have not got the other inventory.'" He further testified: "I had a safe in my house at the time it was burned, and I had some other papers in the safe and my ledger and other books in it at the time the house burned. I couldn't say how long before the fire was the last time I saw the Rushing inventory. I had been looking at the inventory; that is, I had used the inventory for reference to prices on goods a time or two, but I could not say exactly what time; don't know, but some time between April and the time of the fire."

The stock of goods upon which the policies were issued consisted of the stock purchased from Rushing, also a stock purchased by appellees known as the Pauls store stock, and which was moved to and placed in appellees' store in the latter part of March or the first of April, 1907. Appellees kept a set of books which purported to present a complete record of the business transacted by them, showing purchases, sales, and shipments, both for cash and on credit. The books show that appellees' purchases, not including the Rushing and Pauls stocks, amounted to $16,546.44. The Rushing stock was entered in the merchandise account on these books at $6,600; the Pauls stock at $3,100. These figures appear to be the respective amounts of the inventories of said stocks taken on the 1st of January, 1907. No account of the sales from said stocks between the 1st day of January, 1907, and the dates

of their respective purchases by appellees, was kept, and the exact amount and value of these stocks at the time they came into the possession of appellees is not shown by the books or otherwise. In all other respects the books kept by the appellees and produced after the fire comply with the requirements of the policies. The additional insurance taken out by the appellees was procured with the knowledge and consent of appellants or its authorized agent. Upon these facts the appellant requested the trial court to instruct the jury to return a verdict in its favor, and the refusal of the court to give such instruction is complained of under an appropriate assignment of error.

We think the facts before stated, which are shown by the undisputed evidence, clearly establish a breach by appellees of the covenants of the policies in regard to the keeping and production after the fire of the inventories mentioned in said policies. The approval by appellant of the assignment of the policy by Rushing to appellees constituted a new contract between appellant and appellees, and they could not be charged with any breaches by Rushing of the original contract of insurance and were only required to thereafter live up to the terms of the contract. Bayless v. Insurance Co., 106 Mo. App. 684, 80 S. W. 289. The inventory of the stock taken by Rushing on January 1, 1907, having been taken within 12 months prior to the date of the transfer to appellees, they were not required to take an inventory within 30 days after the transfer; but by the plain and unambiguous terms of their contract with appellant they were required to keep the inventory taken on January 1, 1907, in a fireproof safe at all times when the store was not actually open for business, and to produce the same for examination by appellant after the fire. If, without fault or negligence on the part of appellees or their employés, this inventory had been lost or destroyed, the failure to produce it after the fire would not defeat their right of recovery on the policies, but the burden was upon appellees to show that they were in no way responsible for the loss of the inventory. From the testimony of the appellee J. W. Caraway before set out, no other reasonable conclusion can be drawn than that the loss of the inventory was due to the

failure of appellees to keep it in the safe as required by the terms of the policy. There is nothing to indicate the loss of the inventory in any other way, and its loss in this way cannot excuse the failure to produce it. Insurance Co. v. Kemendo, 94 Tex. 367, 61 S. W. 1102. Having agreed with appellant to so keep and produce this inventory, and that in event they failed to produce it for appellant's examination after the fire they would not be entitled to recover anything upon the policies, appellees could only be relieved from the forfeiture of the policies by showing a substantial compliance with the terms of their agreement, and we think the evidence fails to raise the issue of such compliance on their part.

The act of 1903 (Laws 1903, c. 69; Rev. St. art. 3096aa.) declares that: "Any provision in any contract of insurance issued or contracted for in this state, which provides that the answers or statements made in the application for such contract, or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense to any suit brought on such contract, unless it be shown on a trial thereof that the matter or thing misrepresented was material to the risk, or actually contributed to the contingency on which said policy became due and payable; and whether it was material and so contributed in anywise, shall be a question of fact to be determined by the court or jury trying such case." The learned trial judge construed this act as applicable to appellees' covenant to keep and produce the inventory and instructed the jury that, unless they found from all the evidence that the loss of the inventory was material in ascertaining the amount of loss sustained by appellees, the failure to produce the inventory would not defeat appellees' right to recover. That this is not a proper construction of the act mentioned is no longer an open question. By the language of the act its application is restricted to representations of past or present facts, and it cannot be applied to agreements to perform or not perform future acts, or to what are termed "promissory warranties." This was the construction given this act in the case of Insurance Co. v. Weeks, 118 S. W. 1086, and Gross v. Assurance Co., 121 S. W. 517, and in the former case a writ of error was denied by the Supreme Court.

Appellees having failed to keep and produce the inventory as required by their contract, and failed to show that the loss of the inventory was not due to fault or negligence on their part, the trial judge should have instructed the jury to return a verdict in favor of appellant. It is true there is ample evidence to sustain a finding that the value of the goods destroyed exceeded the amount of the insurance, and there is nothing to indicate fraud of any kind on the part of appellees. In these circumstances it may seem a harsh rule that would deny appellees the right to recover for their loss; but it is better that appellees should suffer hardship than that the courts should disregard and trample upon the sacred right of contract. Appellant contracted to pay this loss only in event appellees would furnish it, as evidence of such loss, the inventories mentioned in the policies, and its legal right to stand upon this agreement cannot be questioned. The importance of the missing inventory as evidence of the amount of the loss is apparent. Having contracted to pay only upon the production of this evidence, appellant should not be required to pay without it. Insurance Co. v. Kemendo, 94 Tex. 367, 61 S. W. 1102; Insurance Co. v. Cummings, 98 Tex. 115, 81 S. W. 705.

This conclusion renders a consideration of the remaining assignments of error unnecessary.

The evidence upon this issue being undisputed, and the case fully developed, it follows from the conclusion above expressed that the judgment of the court below should be reversed, and judgment here rendered in favor of appellant, and it has been so ordered.

Reversed and rendered.

BENNER v. FIRE ASS'N OF PHILADELPHIA.

Supreme Court of Pennsylvania. July 1, 1910. 78 Atl. 44.

Statutory Provisions. Oral Agreement to Insure.

The court charged the jury as follows:

"So the law says a parol executory contract, or a contract to insure in the future, is not binding upon the company. That is, it is not a contract of insurance. Viewing the case as we do, that there was no contract of insurance made at the time, we think the plaintiff is not entitled to recover, and you will render a verdict for the defendant."

Plaintiff presented the following points:

"(1) Under the certificate issued by defendant company to A. S. Hoch, he was empowered to write insurance, issue policies, etc., and had authority to renew policies by parol or oral agreements. Answer: Refused.

"(2) If the jury believe that the defendant company, through its agent, A. S. Hoch, agreed to renew the policy of insurance upon plaintiff's barn and contents in the sum of $1,500, in consideration of plaintiff's agreement to pay the premiums therefor, whenever said agent demanded it, such an agreement would and did constitute a valid contract binding upon both parties. Answer: Refused.

"(3) If the jury find such an agreement to have been made, then the policy was, by such agreement, in effect renewed for a like term, sum, property, risk, and premium as the old policy, and the property so insured having been destroyed by fire on November 6, 1905, and within the time covered by said renewal, plaintiff is entitled to recover the value of the property destroyed up to the face of the policy—less the amount of the premium, $30—with interest from the date when the company denied liability, to wit, November 11, 1905. Answer: Refused.

"(4) That A. S. Hoch, the agent of the defendant company, had full power to receive proposals for insurance against loss or damage by fire, and to issue and countersign policies and renewal receipts furnished him by the said defendant, to as-

sent to assignments and transfers, to collect and pay the premiums to the defendant, and transact such other business as might be intrusted to his care, by the defendant, and was the general agent of the company for the purposes aforesaid in New Berlin and vicinity, and his acts, statements, and agreements relating to the renewal of this insurance, the notice of loss, or the denial of liability, were the acts, statements, and agreement of the defendant. Answer: In answer to the last point we say: Hoch's statements and agreements relating to a renewal of insurance were the acts of the company, but under its charter provisions not binding upon it."

Defendant presented these points:

"(1) That plaintiff having testified that prior to the expiration of the policy on the dwelling, which expired on August 19, 1905, he entered into an agreement with Albright S. Hoch, the defendant's agent, to renew a policy of insurance on November 2, 1905, and there being no evidence that any premium was paid or that any policy was delivered, if the property to be insured should have been destroyed by flood, hurricane, or fire before November 2, 1905, when the time arrived at which the contract was to become operative the subject of the insurance not being in existence, there would be nothing to which the policy could attach. During the interim between August and November 2, 1905, the tenure of Mr. Hoch's agency was uncertain; his authority to make contracts might have been terminated at the will of the defendant. He might have died or his power might have been withdrawn by defendant, and when the time arrived for him to perform his agreement, he might have been wholly without authority to act. The plaintiff might voluntarily have disposed of the property to be insured by sale or it might have been sold under legal process and the relations of the parties so changed that the plaintiff might not have had an insurable interest in the property on the date when the contract was to become operative. In any one of the above events there would be no obligation to pay a premium, and where there is no obligation to pay a premium, there is no liability to pay a loss. Even if such an agreement existed it was to take effect in the future, and therefore the defendant would in no manner be liable thereunder and your verdict

must be for the defendant. Answer: The defendant's first point is affirmed.

"(2) That an agent duly authorized to bind his company by contract for insurance may make contracts by parol, which will be binding upon the company before the issuing of the policy, unless there be specific charter requirements that such or all insurance contracts shall be in writing. But in such case the contract and the authority of the agent must be satisfactorily proved. There being no evidence in this case to show any such authority in Albright S. Hoch, to bind the defendant in the manner claimed by the plaintiff, your verdict must be for the defendant. Answer: The second point is affirmed."

Moschzisker, J. The plaintiff owned a piece of real estate with a dwelling house and a barn erected thereon, which improvements were insured with the defendant company under separate policies; the policy on the house expired August 19, 1905, and that on the barn November 2, 1905. The insurance had been placed by one Hoch, an agent of the defendant company. According to the plaintiff's testimony, some time in August, 1905, Hoch met him on the street and said: "The policy on your house will expire shortly." A few days after this the plaintiff met Hoch and said, "Renew the policy, and we will leave it the same as it is, but I have not the money to pay you today, but I will pay you inside of a week or so"; to which Hoch replied, "That would be all right." The plaintiff testified further: "And I said 'Don't forget the barn, and renew the barn as quick as that comes due and send it up, or send it up and I will pay you the same as I did previous to this time with the cash. * * *' I told him he should renew the policy on the barn and watch it up, and I would attend to it. * * * I told him, 'If I can't pay you at once I will pay you like this time'; and he said, 'That will be all right and I will attend to it; you don't need to worry.'" Plaintiff further stated that subsequently he said to Hoch in reference to the insurance, "Watch the others"; and Hoch replied, "I will attend to them; you don't need to worry," and, "I told him again in front of my wife, 'You watch all the insurance.'" The insurance on the barn was not renewed, and on November 6, 1905, it was destroyed by fire. The plaintiff

brought an action against the defendant company, and sought to maintain his claim on the theory that the conversation between himself and Hoch constituted a parol contract whereby the company agreed that upon the expiration of the then existing policy it would insure the barn by a renewal thereof. Binding instructions were given for the defendant, and the plaintiff has appealed.

We cannot agree in all respects with the views of the learned trial judge as expressed in his rulings upon the evidence and in his charge to the jury, but we concur in the conclusion reached.

In Pennsylvania the law permits oral contracts of insurance. Lenox v. Ins. Co., 165 Pa. 575, 30 Atl. 940; Ripka v. Insurance Co., 36 Pa. Super. Ct. 517. Although there is a difference of opinion in the various jurisdictions and among the text-writers as to whether or not an executory contract can be made to insure in the future, yet the clear preponderance of authority seems to be that such contracts are valid. Security Fire Ins. Co. of New York v. Kentucky Marine & Fire Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305; Cohen et al. v. Continental Fire Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; Commercial Mut. Marine Ins. Co. v. Union Mutual Ins. Co., 60 U. S. 318, 15 L. Ed. 636; Tayloe v. Merchants' Fire Ins. Co., 50 U. S. 390, 13 L. Ed. 187; Post v. Ætna Ins. Co., 43 Barb. (N. Y.) 351; Ellis v. Albany City Fire Ins. Co., 50 N. Y. 402, 10 Am. Rep. 495; Angell v. Hartford Fire Ins. Co., 59 N. Y. 171, 17 Am. Rep. 322; Van Loan v. Farmers' Mutual Fire Ins. Ass'n, 90 N. Y. 280; More v. New York Bowery Fire Ins. Co., 130 N. Y. 537, 29 N. E. 757; Stickley v. Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838; Baubie v. Ætna Ins. Co., 2 Dill. 156, Fed. Cas. No. 1,111; Taylor v. Germania Ins. Co., 2 Dill. 282, Fed Cas. No. 13,793; King v. Cox, 63 Ark. 204, 37 S. W. 877; Newark Machine Co. v. Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768. The leading cases pro and con are discussed in McCabe Bros. v. Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641, and the conclusion is stated, "That an insurance company can by a preliminary parol contract bind itself to issue or to renew a policy in the future seems too well set-

tled to admit of doubt." The argument against the validity of such contracts as stated by Ostrander on Insurance (2d Ed.), § 12, and adopted by the court below, is not convincing.

In these days of great commercial activity, one can readily conceive of many instances where a man would not be willing to set aside capital and agree to place it in a prospective enterprise, unless he could be positively assured of indemnity against fire risk, and this can only be accomplished by contracts to insure in the future. We find no Pennsylvania authority which holds directly against their validity, and in Hamilton v. Lycoming Mut. Ins. Co., 5 Pa. 339, Chief Justice Gibson says: "In commercial towns, where the members of the profession are familiar with the law of insurance, actions on mere agreements to insure, whether against fire or perils of the sea, are not uncommon. They are noticed in 1 Phillips on Insurance, § 3, p. 9; but it appears that the terms of the contract must have been settled by the concurrent assent of the parties, and that nothing must have remained to be done but to deliver the policy, else the risk will not have been begun; in other words, that the agreement must have had, at some particular instant, that aggregatio mentium which is indispensable in the constitution of every contract." The tendency of our cases is to favor the validity of such contracts, but they uniformily hold that all parol contracts of insurance, even those to take effect in præsenti, must be clearly established in every particular. Paterson v. Benjamin Franklin Ins. Co., 81 Pa. 454; Ripka v. Fire Ins. Co., 36 Pa. Super. Ct. 517. "To constitute a verbal contract of insurance the minds of the parties must have met upon all the essentials of the contract. The testimony must make clear the subject-matter of insurance, the amount and elements of the risk, including its duration in point of time and extent in point of hazard assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other." Keystone Mattress, etc., Co. v. Pittsburg Underwriters, 21 Pa. Super. Ct. 42. This is a wise and salutary rule which bears hard upon no one; for oral contracts of insurance are not usual, and if

for any reason one should desire to make such a contract he ought to do so in a proper manner, so that in any future controversy on the subject it can be made plain to the tribunal which has to pass upon it. Otherwise, wherever a careless man becomes in the habit of depending upon the insurance agent to notify him of the expiration of his policy, and the insurance runs out, he will be too apt to assume the right to set up such a contract.

We do not overlook the cases that hold to the rule that where an oral preliminary contract of insurance is shown it will be presumed that the parties contemplated such a form of policy as has been usual between them, or is usual in such cases, and we can conceive of instances where this rule might well be applied, but this is not one of them.

In the present case the testimony to establish the alleged contract is too vague. Although it is repeated in several different forms upon the notes, we have stated it most strongly for the plaintiff. And yet what have we? A conversation between the plaintiff and the agent of the defendant company about renewing another insurance, in which the former said to the latter, "Don't forget the barn. Renew the barn as quick as that comes due," and received the reply, "I will attend to it; you don't need to worry." How can we from this say with any safety that the defendant company thereby agreed upon an insurance in any fixed amount for any fixed term either in the present or future? The very words used by the agent indicate an intent to attend to something in the future for the plaintiff, rather than a then present assumption of an obligation binding upon his company. The old policy on the barn was in the possession of the plaintiff, so he as well as Hoch had means of information as to the date of its expiration. The whole surroundings negative the idea of a serious contract being made. The conversation consisted of a few words on the street; no money was passed, no memorandum was made, and no definite promise given on either side. After the conversation the plaintiff again instructed Hoch to watch the insurance, which would indicate that he did not consider himself protected by any binding contract at the time of the first conversation. The testimony is lacking in details essential

to show clearly a contract to insure in the future, and it is also lacking, in proper proof of the authority of the agent to make such a contract.

As evidence of Hoch's authority, the plaintiff offered a written commission from the defendant company appointing Hoch agent in the territory in question, "with full power to receive proposals for insurance against loss or damage by fire, * * * with authority to issue and countersign policies and renewal receipts, furnished by said associations; to assent to assignments and transfers, to collect premiums, * * * and to transact such other business as may be intrusted to his care." This commission cannot be construed as conferring upon the agent authority to bind and obligate his company on the unusual contract here sought to be established. True it is that the third specification of error contains an offer to show that insurance agents "are accustomed to agree to renewals in advance of the expiration of the current policies and give credit for premiums, accounting to the company monthly for the premiums whether they are paid or not by the insured"; and that the fifth specification presents a similar offer "for the purpose of showing this is the usage and custom of this particular company." But the offers were properly refused While it was admitted by the plaintiff that he had never paid the premium on the insurance claimed, yet there was no defense on that ground, so the question of credits for premiums was out of the case. With this out, the offers were merely to show that the agents were accustomed to agree to renewals in advance of the expiration of current policies; not that they were accustomed to make such oral contracts for future insurance or renewals as contended for by the plaintiff. Therefore the offers were irrelevant and immaterial to the issue. "We have no right to reverse the action of the court below upon a surmise that the defendants might have made their offer broader." Silliman v. Whitmer, 11 Pa. Super. Ct. 243. Assuming that the plaintiff could have made the offers as stated good, there is not enough in the case to show either that the agent had authority to make the contract contended for by the plaintiff, or that, in point of fact, such a contract was ever actually consummated.

There is another serious point in this case. The defendant company was incorporated under the Act of May 5, 1871 (P. L. 575), the sixth section of which provides: "The president and directors shall have full power, on behalf of said corporation, to make insurance * * * and to make, execute, and perfect such and so many contracts, bargains, agreements, policies, and other instruments as shall or may be necessary and as the nature of the case shall or may require; and every such contract, bargain, agreement, and policy to be made by the said corporation shall be in writing or in print. * * *" The defendant contends that this charter requirement is in itself a sufficient defense against an oral contract of insurance; while the plaintiff contends that the provision refers only to executed contracts or policies of insurance, and not to preliminary contracts to make or renew policies; and he makes a most convincing argument on this point, citing many respectable authorities.

But no matter what the view may be elsewhere, in Pennsylvania we have an authority which settles the question here. In Hazlett v. Allegheny Ins. Co., 1 Walk. 336, the defendant company was chartered under the Act of April 2, 1856, (P. L. 214), the tenth section of which is to all intents and purposes identical with section 6 of the act of 1871. The claim was on a verbal contract of insurance. The court below reserved the question, "Whether a contract of insurance such as specified in plaintiff's first point, is binding upon defendant, and entitles plaintiff to recover in this case?" In entering judgment for the defendant non obstante veredicto the court said: "Upon the first question, I think the law under the charter of the defendant is clearly with the defendant"; and in affirming this judgment we said: "Contracts of insurance are expressly required by defendant's charter to be in writing. * * * There being no sufficient ground of estoppel alleged the case fell back * * * upon the mere binding effect of a verbal contract for insurance, and this the charter answers in the negative." It will not do to say that the construction of this charter requirement contended for by the plaintiff in the present case was not considered by this court in the Hazlett Case, for it appears in the report that "George

Shiras, Esq., for plaintiff in error argued that a verbal contract of insurance is binding. * * * The company would still be liable on an agreement to issue the policy, though the statute requires the formal insurance policies to be in writing. * * * This company could make arrangements, and even parol promises, as to the terms on which a policy shall be issued, so that a court of equity will compel the company to execute the contract specifically, and where the loss has happened, to avoid a circuity of action, the chancellor will enter a decree directly for the amount of an insurance for which the company ought to have delivered their policy properly attested." And, "M. W. Acheson and W. G. Hawkins, Jr., Esqs., contra, replied the company could not make a formal policy of insurance; for by its charter it is subject to the insurance act of April 2, 1856 * * * as follows: '* * * And every such contract, bargain, policy, and other agreement shall be in writing or print.' * * *" This shows that the point was clearly presented by most able counsel, and although the opinion is brief, we must assume that it was passed upon after full consideration.

In Ripka v. Fire Ins. Co., 36 Pa. Super. Ct. 517. President Judge Rice states the rule: "An agent duly authorized * * * may make contracts by parol * * * unless there be specific charter requirements that * * * all insurance contracts shall be in writing." The act of 1856 was a general insurance act which by its terms was made applicable to companies to be incorporated by special acts in the future. It was in force until its repeal by the Act of May 1, 1876 (P. L. 53). Moise and Matlack on insurance, Col. 15,479. The defendant company was incorporated by a special act in 1871. Both of these acts contain the same provision requiring insurance contracts to be in writing; so that even if this provision had been omitted from the act of 1871, the company would still have been bound by the provision under the act of 1856, and therefore it was in the same position as the defendant in the Hazlett Case. Under such circumstances, a construction having already been placed by this court upon the very words contained in the charter of the defendant company, we cannot depart therefrom on facts in the

present case. We do not mean to rule that this charter provision would be a protection against all verbal contracts of insurance. There might be cases where certain elements of estoppel would exist which would afford life to such contracts; but there are no such elements in the present case any more than in the Hazlett Case where the plaintiff claimed that the understanding and agreement was that the insurance "was to take place immediately," and he failed to insure elsewhere and met with a consequent loss.

But the plaintiff contends that the effect of the act of 1871 cannot be considered for two reasons: First, under the rule of the local court a specification in writing of all special matters of defense must be furnished before trial, and this act was not referred to in defendant's specification; next, the Act of May 11, 1881 (P. L. 20) forbids consideration of the defense. As to the first contention, an examination of the record shows that no such objection was made in the court below. "It is well settled that the party complaining on appeal of the admission of the evidence objected to in the court below, will be limited to the specific objections made to it there." Danley v. Danley, 179 Pa. 170, 36 Atl. 225; Messmore v. Morrison, 172 Pa. 300, 34 Atl. 45. When a party relies upon the want of special notice he must place his objection on that ground. Hawk v. Geddis, 16 Serg. & R. 23; Rearich v. Swinehart, 11 Pa. 233, 51 Am. Dec. 540; Miller v. Stem, 12 Pa. 383; Hobson v. Croft, 9 Pa. 363. Concerning the next point it is sufficient to say that the act of 1881 is limited in every particular to written policies and has nothing to do with oral contracts of insurance. Lenox v. Ins. Co., 165 Pa. 575, 30 Atl. 940. We have considered all the assignments of error, and although we do not entirely agree with the views of the learned trial judge as expressed and brought upon the record in the second, tenth, and eleventh specifications, we find no reversible error.

The judgment is affirmed.

ARMOUR et al. v. THE TRANSATLANTIC F. I. C.

Court of Appeals of New York, 1882. 90 N. Y. 450.

Rate of Premium. Misrepresentation.

Rapallo, J. The court at the trial dismissed the complaint in this action, on the defendant's evidence, and refused the plaintiffs' request to submit the questions of fact in the case to the jury. The only question for our consideration is whether the facts alleged on the part of the defendant were, or either of them was, sufficient to defeat the plaintiffs' claim to recover, and so clearly proved by conclusive or uncontroverted evidence as to justify the court in withdrawing the case from the consideration of the jury. The action was upon a policy of insurance issued by the defendant upon a warehouse of the plaintiffs in the city of Chicago, which was partially destroyed by fire upon the 25th of January, 1879. The warehouse consisted of three sections, and the amount of insurance on one of the sections covered by the plaintiffs' policy was $3,000. The loss on that section was about $14,000, and the total insurance thereon about $17,000. The amount insured on all three sections was $38,000, exclusive of defendant's policy, at the time of the loss. The pro-rata share of loss claimed from the defendant was $2,440.

The defendant set up three defenses. 1st. That the policy was issued upon a misrepresentation of the plaintiffs, through their agent, that the rate of insurance in Chicago on the premises insured was, at the date of their application for said insurance, seventy-five cents for every $100 insured for the term of one year; whereas, in fact, the rate of insurance upon the property in Chicago at the time of plaintiffs' application was $1.25 for every $100 insured. 2d. That at the time of the application for said insurance, the plaintiffs, by their agent, represented that the property sought to be insured was already insured in the amount of $200,000 in various other companies, of which a list was furnished; that the defendant relied upon the truth of said representation in making the policy and accepting the risk, but that in fact none of the

property mentioned in said policy was insured in the amount of $200,000, or to exceed the sum of $50,000. 3d. That, according to the terms of the policy, the defendant was entitled to terminate it on giving notice to the plaintiffs, and that it did so elect to terminate it before the alleged loss by fire.

DAKIN Respondent v. LIVERPOOL AND GLOBE INS. Co. Appellant.

Court of Appeals N. Y. 77 N. Y. 600.

Breach of Stipulation.

In this case there were four policies, all running to "S. D. Wood and T. W. Moore & Co. as interest may appear" "Loss if not payable to Lyon and Dakin". The property was owned by T. W. Moore & Co. Wood had a mortgage on the premises, Wood's mortgage being second to a mortgage in favor of Lyon and Dakin. After the policies were issued the interest of Lyon in the mortgage passed to Dakin and Dakin conveyed an interest to Wood. One of the defenses set up was that the interest of Wood as mortgagee was not included in the risk assumed and was not set out in the policies, that the transfer of interest from Lyon to Dakin and from Dakin to Wood was a breach of the following condition of the policy. "If the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not stated in the policy; or if the interest of the assured in the property be any than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, and it is not so expressed in the written part of this policy." Held, that the language of the stipulation left the question open to prove interest and whose interest. The court said:— "Where the clause expressive of doubt shows that the uncertainty is as to the person who is to have the benefit of the contract, who the person is may be proven. Where it is as to the interest that is to be protected, what the

interest is may be proven, and what is the extent, kind, or quality of it. The phrase in this policy, "as interest may appear," is as applicable to Wood, as one of the insured, as to L. W. Moore & Co. It indicates that when the policy was filled up by the defendants, there was uncertainty as to his interest, or that for some reason it was not thought best to state it; and the use of the phrase gave the right to him to show what the fact was as to it, whenever the time came at which it was for his good to show it." The plaintiff recovers.

CITIZENS INS. CO. v. HOFFMAN.

Supreme Court of Indiana, May, 1891. 27 N. E. 745.

Pro rata Liability.

Miller, J. The appellee sued the appellant to recover on a policy of insurance by which the appellant, in consideration of $15, agreed to indemnify him to the extent of $1,500 against loss by fire of the property therein described. The complaint was in two paragraphs. The first averred a total loss of $90,000, and asked for judgment for $1,500, the full amount of the policy. The second averred a loss of $51,000, a total insurance of $60,000, and that the defendant was liable for such proportion of the loss as the amount of the policy bore to the whole amount of insurance carried. The defendant answered in two paragraphs. The first avers that by the policy the defendant agreed to pay only the one-sixtieth of the loss; that the loss was $51,000; and that the defendant was liable for the one-sixtieth of that amount, viz., $850 and interest, and no more. In the second paragraph it is alleged that the application for the policy was in a letter addressed by the plaintiff to the managers of the defendant; that in such application the plaintiff represented that the amount of insurance upon the property described in the policy filed with the complaint, which was at all times carried by the plaintiff, was $90,000, including the amount applied for; that

in such letter the plaintiff represented and guaranteed that there was, and should thereafter be, during the time the defendant might insure the property, an insurance in the sum of $90,000; that the letter had been lost, and the defendant was therefore unable to file a copy of the same with the answer; that the policy was issued solely in consideration of the representation and guaranty contained in the letter; that by the terms of the policy the defendant only agreed to pay the one-sixtieth of the loss which the plaintiff might sustain by fire on each of the items of property described in the policy. It is averred that the plaintiff, in violation of said representation and guaranty, did not keep and maintain $90,000 insurance upon the property, but only had $60,000 insurance at the time of the fire; that the total loss sustained was $51,000, of which the defendant was liable for $850, and interest, and no more. Demurrers were sustained to each of these paragraphs of answer, and, the defendant declining to plead further, judgment was rendered for $1,275, and interest. Appellant assigns as error the ruling of the court in sustaining the demurrers to these paragraphs of answer.

The facts stated in the complaint, and the issues of law and fact presented by the first paragraph of answer, are substantially the same which were considered and ruled upon in the case of Insurance Co. v. Hoffman, 27 N. E. 561, (at this term); and upon the authority of that case we hold that the court did not err in sustaining the demurrer to the first paragraph of answer.

In the second paragraph of answer of the appellant the letter written by the assured to the company is relied upon either as a warranty or a representation. In Insurance Co. v. Monninger, 18 Ind. 352, this court, in distinguishing between a representation and a warranty, cite with approval the following definition of a representation: "A verbal or written statement made by the assured to the underwriter before the subscription of the policy as to the existence of some fact or state of facts tending to induce the underwriter more readily to assume the risk by diminishing the estimate he would otherwise form of it. It is a part of the preliminary proceedings which propose the contract, and a warranty is a

part of the contract as it has been completed." May, Ins. (3d Ed.) § 159; 1 Wood, Ins. 2d Ed.) §150. It will be observed that there is no allegation in the answer that there was $90,000 insurance on the property at the time the policy was issued. Neither is it claimed in the answer that at or prior to the time the policy was issued the assured made any statement of fact that was not at the time true. It is contended that, if the application did not contain a misstatement of fact, it constituted a warranty or guaranty that the assured would maintain $90,000 insurance on the property. It nowhere appears from the policy that the application was incorporated in or made a part of the same. We find in the policy this clause: "If an application, survey, plan, or description is referred to in the policy, such application, survey, plan, or description is hereby made a part of this contract, and a warranty by the assured." This language is significant when taken in connection with the fact that no reference was made in the policy to any application having been made for insurance. The necessity for making the application a part of the policy in order to make any statements therein contained warranties is tersely stated by Elliott, J., in Assurance Fund v. Allen, 106 Ind. 593, 7 N. E. Rep. 317, as follows: "Statements made by the insured in his application for insurance are not deemed warranties unless they are incorporated in the policy, or in some appropriate method referred to in that instrument." It does not come within the rule of construing and reading together papers contemporaneously executed, as parts of the same contract, (Burns v. Manufacturing Co., 87 Ind. 541; and Manufacturing Co. v. Forsyth, 108 Ind. 334, 9 N. E. Rep. 372;) for the policy is a complete instrument and contract within and of itself, containing no reference or allusion to any other instrument. It is evident from the averments of the answer, taken in connection with the policy, that the company, instead of accepting the terms of the letter, by inserting a clause in the policy to that effect, as is usual when a given amount of insurance is to be maintained, issued the policy, giving the assured the privilege of making other insurance without limit or notice until

required. The general and well-settled rule is that the application forms no part of the policy unless it is referred to and adopted, Wood, Ins. § 138; May, Ins. § 159; Owens v. Insurance Co., 56 N. Y. 565; Insurance Co. v. Monninger, 18 Ind. 352. Holding as we do, that the company did not adopt or treat the application as a part of the policy, no inference arises that the policy was issued upon the terms or conditions mentioned in the letter or application; for it might well be inferred that the terms of the application were not satisfactory to the insurer, and that they, therefore, chose to make the contract upon their own terms, and independent of the application. We are of the opinion that the court did not err in sustaining the demurrer to the second paragraph of answer. Judgment affirmed.

Accord. Clark v. Union Mutual F. Ins. Co., 40 N. H. 333; Bellatly v. Thomaston M. F. Ins. Co., 61 Me. 414; Wood v. Fireman's F. Ins. Co., 126 Mass. 316; Jackson v. St. Paul F. & M. Ins. Co., 99 U. S. 124; Lamb v. Council Bluffs Ins. Co., 70 Iowa, 238, 242.

JOHANNES v. PHOENIX INSURANCE COMPANY,

Supreme Court of Wisconsin, April, 1886. 66 Wis. 50, 27 N. W. R. 414.

Rights of Policy-holder. Reinsurance.

Cassoday, J. A policy of fire insurance is a contract of indemnity. Darrell v. Tibbitts, 5 Q. B. Div. 560. By such contract the insurer agrees to compensate the assured for loss by fire of certain property, for a given time. The existence of such contract gives the insurer an insurable interest in the property insured, co-extensive with its liability. Delaware Ins. Co. v. Quaker City Ins. Co., 3 Grant, Cas. 71; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., 17 Wend. 359. Here the Standard Fire Office of London insured the plaintiff's property for three years from July 1, 1883. After doing so it became desirous of reinsuring its risks upon property in the United States. The Phoenix insur-

ance Company of Brooklyn was at the same time desirous of acquiring and purchasing the business and good will of the Standard Company. Accordingly the two companies made the agreement set forth in the statement of facts, January 2, 1884. At that time the plaintiff's policy had two years and a half more to run. Of course the Standard Company had an insurable interest in the plaintiff's property commensurate with its liability. The agreement between the two companies, as alleged, was based upon a sufficient consideration. Its validity is not assailed. The contention is that the contract between the two companies is confined strictly to them, and that the plaintiff under his policy issued by the Standard has no privity in the contract made by the Phoenix, and can maintain no action thereon against the Phoenix. In other words, that it was strictly a contract of reinsurance by the Standard Company, solely for its own benefit, and not for the benefit of its then existing policy-holders in the United States.

In support of such contention the learned counsel for the appellant cites several cases. Some of these cases, and perhaps some others, will now be considered, as the question may be regarded as new. In doing so we shall confine ourselves very much to the wording of each particular contract adjudicated, for the question presented is, after all, one of contract. The construction given to one contract may essentially aid the construction of another; but this is so only where the clauses of the two contracts to be construed are substantially alike. Some of the cases cited were upon contracts of strict reinsurance, as above defined, and clearly sustained the position of counsel, if the contract here is to be so restricted. Hastie v. De Peyster, 3 Caine 190; Herckenrath v. American M. Ins. Co., 3 Barb. C. H. 63; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., supra; Home v. Mutual Safety Ins. Co., 1 Sanf. 137; S. C. 2 N. Y. 235; Carrington v. Connecticut F. & M. Ins. Co., Bosw. 152; Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104; Strong v. Phoenix Ins. Co., 62 Mo. 289; Gantt v. American Cent. Ins. Co., 68 Mo. 503; Delaware Ins. Co. v. Quaker City Ins. Co., supra.

Thus in Home v. Mutual Safety Ins. Co., supra, the defendant, by the policy of reinsurance, "promised and agreed to make good to the American Mutual Insurance Company all such loss or damage," etc. So, in the case cited in Bosworth the agreement was to re-insure the American Mutual Insurance Company of Amsterdam upon the following policies issued by them, loss, if any, payable to the assured upon the same terms and conditions, and at the same time, as are contained in the original policies." A description of the several policies is then given. The court, at general term, said: "If the word 'assured', as used in this contract, means the party reassured, the present plaintiffs have no interest in the contract, and no right to maintain an action upon it; * * * but "if the word "assured' does not mean the party 'reinsured', and that party only, then it includes and embraces, not only the plaintiffs, but also nineteen other individuals and firms. By the contract of reinsurance the defendants took upon themselves the risks which the corporation reinsured had incurred by insuring twenty separate and distinct policies." The court then determined that the word "assured", as used, meant the company issuing the original policies and obtaining the reinsurance, and not any of such policy-holders. In Blackstone v. Insurance Co., supra, the agreement was simply to reinsure the company, and the principal contention was whether the insurance was double under the peculiar wording of the policy. The same is true of Owen v. Sturges, 67 Ill. 366, and Insurance Co. v. Insurance Co., 38 Ohio St. 11, cited.

But in the case before us the contract between the defendant companies was, as it seems to us, something more than a mere reinsurance. By that contract the Standard Company sold and turned over to the Phoenix its entire business, and the good will of that business, in the United States, together with a large amount of bonds and other property, in consideration of which the Phoenix thereby "reinsured all the risks" of the Standard Company "upon property situated in the United States; * * * and agreed that all losses arising under the policies of the said defendant the Standard Fire Office,

Limited, upon property situated in the United States of America, should after that time, (January 1, 1884,) be borne by the said Phoenix Insurance Company, and should be paid, satisfied, and discharged by it; * * * and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied, and discharged by said Phoenix Insurance Company; which thereupon became owner of the good will, original documents, and books of its co-defendant herein (the Standard Company) relating to the risks aforesaid and assumed control of the same, and of the business pertaining to said risks, policies, and losses."

Such are the alleged terms of the contract we are required to construe. The losses thus arising under the policies could only "be borne, paid, satisfied, and discharged," by the Phoenix in a direct transaction with the policy-holders. Even a payment by it of the amount of the loss to the Standard Company would not satisfy or discharge the plaintiff's claim for such loss on his policy. That could only be done on payment to the plaintiff. It seems to us that by the terms of the contract, as alleged, the Phœnix, in effect, thereby assume the risk covered by each policy, and agreed to pay any loss arising under each policy. The mere fact that the plaintiff was not named in the contract does not preclude him from maintaining an action upon the contract. Thus a policy "for whom it may concern" assures all persons having an insurable interest that are intended to be covered by it, whether known to the insurers or not. The Sidney, 23 Fed. Rep. 88. So, an agreement "to become insurer to C. for the benefit of himself and others having tobacco in store, and to be stored, in his warehouse, on said stock of tobacco," was held by this court sufficient to sustain an action on the contract against the insurer, and in favor of such "other" persons, though not named. Strohn v. Hartford Fire Ins. Co., 33 Wis. 648; S. C. 37 Wis. 627. In Glen v. Hope Mut. Life Ins. Co., 1 Thomp. &c. 463, S. C. affirmed, 56 N. Y. 379, the defendant had agreed with the Craftmen's Assurance Company to reinsure the latter company on all its risks, "for which policies of the said party of the second part (Craftmen's Assurance Company)

are outstanding at this date, and hereby agree to assure all such policies, and to pay the holders thereof all such sums as the party of the second part may, by force of such policies, become liable to pay, * * * the liability for death losses to be limited to such deaths as may occur on and after this date"; and it was held that the defendant was liable on the contract of reinsurance directly to the several holders of policies for the whole amount insured thereby. The same doctrine, upon the same reinsurance contract, was reaffirmed in Fischer v. Hope Mut. Life. Ins. Co., 40 N. Y. Superior Ct. 291; S. C. affirmed, 69 N. Y. 161. It seems to us that the contract of reinsurance in those two cases was substantially like the one at bar. Those actions in favor of such policy-holders, upon such contract of reinsurance, were sustained upon the authority of Lawrence v. Fox, 20 N. Y. 268, and similar cases, that case has been expressly followed by this court. Gray v. McDonald, 19 Wis. 217. The same principle has frequently been reiterated by this court. Putney v. Farnham 27 Wis. 187; McDowell v. Laev, 35 Wis. 171; Bassett v. Hughes, 43 Wis. 319; Kollock v. Parcher, 52 Wis. 399; S. C. 9 N. W. Rep. 67; Hoile v. Bailey, 58 Wis. 450-452; S. C. 17 N. W. Rep. 322; Town of Platteville v. Hooper, 63 Wis. 383; S. C. 23 N. W. Rep. 581. The principle thus sanctioned in these cases is to the effect that if, on the receipt of a good and sufficient consideration, A. agrees with B. to assume and pay a debt of the latter to C., then C. may maintain an action directly upon such contract against A., notwithstanding C. is not privy to the consideration received by A. We think the case at bar comes within the principle.

The order of the circuit court is affirmed.

Accord. Barnes v. Hekla Fire Ins. Co., 56 Minn. 41; Hort's Case, 1 Ch. Div. 307; Harman's Case, 1 Ch. Div. 326. Contra. Kavanaugh v. Omaha Life Ass'n, 84 Fed. 295.

Note 1. Where one person, for a valuable consideration, agrees with another to pay a debt owing from such other to a third person, the latter can enforce the contract.

Note 2. Where the contract between the insuring company and the reinsuring company provides that the reinsuring company

is liable in such sums as the insuring company may have to pay the insured or for the actual damage sustained by the insuring company an original action at law by insured against the reinsuring company cannot be maintained.

GOODRICH'S APPEAL.

Supreme Court of Pennsylvania, Oct., 1885. 109 Pa. 423, 2 Atl. 209.

Rights of Policy-holders in Reinsurance Contract.

Clark, J. The only question raised by the several assignments of error in this case is whether or not, in the distribution of the assets of the Penn Fire Insurance Company of Philadelphia in the hands of an assignee, the appellants are entitled to any preference over the general creditors of the company. The preference claimed is as to the fund of $6,000 received on settlement or compromise with the French corporation known as "LaCaisse Generale des Assurances Agricoles et des Assurances contre l'Incendie". It is unfortunate, perhaps, that the formal policy provided for in the agreement between the Caisse Generale, etc., and the Penn Company was never issued as the true intent of the contracting parties would doubtless have been therein more fully disclosed; but this was not done, and we must learn that intent and determine the rights of the contending parties, upon the fair "reading and construction" of the executory contract evidenced by the writings of twenty-fifth and twenty-sixth February, 1876. In the agreement of twenty-sixth February, 1876, t he receipt of $10,000 is acknowledged; in consideration of which "a policy of insurance is to be issued by La Caisse Generale," etc., "reinsuring the outstanding risks of the Penn Fire Insurance Company," etc., "the amount over and above $10,000 necessary to 'reinsure' its outstanding risks to be paid," etc. In the more full and formal contract, made two days later, it is provided that the "policy of reinsurance" to be issued shall be subject to certain conditions, etc.

"Reinsurance" is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected the insurer may have the subject of insurance reinsured to him by some other. There is in such case, however, no privity between the original insured and the reinsurer; the contract of insurance and of reinsurance being totally distinct and disconnected. But while the contract is one of indemnity simply, in which the insurer is to be protected to the extent of his loss, when the loss is incurred and ascertained, the reinsurer must pay the amount. The insurer may at once, without payment to the original assured, resort to this action. Fame Ins. Co.'s Appeal, 83 Pa. St. 396. Even if the insurer fail, or become insolvent, so that his insured receives only a dividend, however small, the reinsurer can gain nothing by this, but must pay the amount of the loss to the first insurer. Hastie v. DePeyster, 3 Caines 190; Home v. Mutual Safety Ins. Co., 1 Sandf. 137, affirmed in court of appeals sub nom.; Mutual Safety Co. v. Home, 2 N. Y. 235; 3 Kent Comm. 279; Marsh Ins. 143. So, in Herckenrath v. American Ins. Co., 3 Barb. Ch. 63, Chancellor Walworth decided that "where an insurance company has underwritten a policy, and afterwards causes itself to be reinsured, and after the loss of the property insured such company becomes insolvent, the person originally insured has no equitable lien upon the sum of money due on the contract of reinsurance; but that fund belongs to all the creditors of the insolvent company ratably". These are familiar principles of insurance law, and are not anywhere doubted. If, therefore, the contract between La Caisse Generale, etc., and the Penn Fire Insurance Company was for a policy of reinsurance, properly so called, the appellants could have no preferable claim or lien upon the fund in question although the Penn Company was admittedly and hopelessly insolvent. It is contended, however. by the appellants that the contract in question, when read in the light of the facts attending its execution, cannot, in any strict sense, be considered a contract for reinsurance; that it was

not intended to provide indemnity to the company, but to the individual policy-holders, and that the policy-holders can claim the advantage of this so-called reinsurance for themselves directly and exclusively; that the term "reinsurance" was not used in its legal or technical sense, but in a different sense, defined by the particular facts which induced the creation of the contract, and that the reinsurance by the Caisse Generale, etc., was in fact, although not so expressed, a conditional assumption of the business of the Penn Company.

It was competent, we think, for the Penn Company, acting in the interest of its general policy-holders, with or without authority, in view of the insolvency, and without fraud, to effect an indemnity for their individual protection in case of loss, (Glenn v. Hope Mut. Ins. Co., 56 N. Y. 379; Fischer v Same, 69 N. Y. 161,) which, even after loss, they might ratify and approve, (Flemming v. Marine Ins. Co., 4 Whart. 59; Stillwell v. Staples, 19 N. Y. 405; 1 Amer. Lead Cas. 344;) and if the insurance was in their interest, directly for their benefit, and free from any additional burden or obligation on their part, ratification might be presumed. But we fail to find anything in the words of the contract, in the special circumstances attending its creation, in the nature of the transaction itself, or in any rule of public policy, that would justify us in saying that the contract was any other than a contract of reinsurance, in the proper sense of that term. The contract was written by and between persons on both sides actually engaged in the business of insurance,—persons conversant, doubtless, with the meaning of terms employed in the practice of insurance,—and the presumption is a fair and reasonable one that words of a technical or special import were by them properly applied. The words "reinsure" and "reinsurance" would therefore seem, in the first instance at least, to characterize the contract, and to point out the object and purpose of the parties. The proper signification of these terms would, of course, vary with the clearly manifested intention of the parties. But the contract is with the Penn Company, for a consideration moving from it, providing for a policy to the Penn Company

to reinsure its risks. There is no provision whatever expressed in the contract for the individual indemnity of the policyholders, nor for the insurance of their property for them. The reinsurance is expressly upon the "outstanding risks" of the company. The contract of reinsurance, in some sense perhaps, operates upon the property itself rather than the risk, but the fact that the policy was to be upon the "risks" indicates that it was the company's insurable interests in the property which formed the basis of the insurance.

It is true that, except for the appellants' losses by fire, the fund of $6,000 would not have been realized, but this is incident to all cases of reinsurance. It is true, also, that the reinsurance was of all the outstanding risks of the company, and not, as is usually the case, of any particular part of them; but whether a company shall reinsure the whole, or only a part, of its risks is a question of policy for the company, dependent upon its purposes for the future or its circumstances. If the underwriter wishes to change his business, or to quit the country, or to avert insolvency, he may choose to reinsure the whole. Under different circumstances he may choose to indemnify himself as to part only. The provision that the Penn Company "will turn over to the Caisse Generale its original registers, books, reports, and other papers in any way relating to the policies thereby insured," and "that the Caisse Generale will assume the care and expense of the adjustment of all losses which may occur under the policies of the said Penn Fire Insurance Company, which are thereby to be reinsured," are consistent, we think, with either theory of the case,—as consistent with one as with the other,—and they, therefore, prove nothing either way. Such a course of proceeding may be rare, but cases are rare, perhaps, when the reinsurance is upon the whole list of the underwriter's risks, and where this is the case there can certainly be nothing unreasonable in the provision. We think there is nothing on the face of the contract itself to give it the effect claimed for it, and we can discover nothing in the facts which led up to its execution which would evidence any intention of the parties different from what is plainly expressed.

The inducing cause of the contract, doubtless, was the proceeding instituted by the attorney general at the instance of the insurance commissioner. After the order to suspend business, the company was permitted to effect a reinsurance of its outstanding policies, etc., for 60 days, with the hope that its available funds would prove sufficient to complete the reinsurance at the expiration of that time. Had these hopes been realized, it is probable that the decree of dissolution, during the period of reinsurance at least, might not have been entered. The commission, in his report, refers, it is true, to this contract as an effort of the company to "secure its policy-holders by reinsurance"; but if the contract were, in fact, otherwise, the report of the commissioner, subsequently made, could not change its provisions or alter its effect. The Caisse Generale, etc., in paying certain of the losses directly to the policy-holders, would seem subsequently to have put a construction on the contract conformable to the appellants' claim; but the effect of this is certainly overcome by the fact that the Penn Company repudiated this payment by bringing suit against the Caisse Generale, etc., and the fund now for distribution is the result of that action. To sustain the appellant's contention in this case, the fact should clearly appear, either by the contract or otherwise in the transaction, that the indemnity provided was to the policy-holders directly and in the absence of such proof their claim of preference must be disregarded.

The case of Glen v. Hope Mut. Ins. Co., supra, is greatly relied on by the appellants, but that case is materially different from this. By a contract duly executed, the Hope agreed to reinsure the Craftsman Company on all risks for which its policies were outstanding, and also to assume all such policies, and to pay the holders thereof all such sums as the Craftsman might, by force of such policies, become liable to pay. The engagement to the policy-holders was direct and express, and the liability was therefore direct and exclusive. This case was followed by Fisher v. Hope Mut. Ins. Co., supra, which was another action on the same contract, and the rulings in the former case were in the latter recognized and approved.

The decree of the court of common pleas is affirmed, and the appeal is dismissed at the costs of the appellant.

Contra. Wood v. Moriarity, 15 R. I. 522, 9 Atl. 427.;

Shouf v. Ins. Co., 127 N. C. 308, 37 S. E. 451, 80 Am St. R. 804.

Note 1. Where the contract of reinsurance contains an agreement to make payment directly to the policy holder the liability of the reinsurer at the suit of the insured will not be affected by the fact that the reinsurer would have a good defense against a demand of payment by the insurer. Glen v. Insurance Co., 56 N. Y. 379.

Note. 2. Where the reinsurance is for the benefit of the policy holder the relationship of the reinsuring company is that of principal, while original insurance company is surety.

Note 3. A reinsurer may be required to pay the amount of the loss which it is liable for, directly to the insured or the party ultimately entitled to the money, when the prior insurer which it has indemnified has become insolvent. Hunt v. New Hampshire Fire Underwriters Ass'n (N. H.) 38 L. R. A. 514.

Note 4. In most of the states the statute law now provides for amalgamation, consolidation and reinsurance of insurance companies generally accompanied by the reinsurance contract The courts strictly construe these statutes, guarding the interests of the insured. See—Bolles v. Mutual Reserve Fund Association, 220 Ill. 400, 77 N. E. 198.

CHAPTER IX.

WARRANTIES AND REPRESENTATIONS.

BLACKHURST v. COCKELL.

Court of King's Bench, 1789. 3 T. R. 360.

Construction of Warranty.

Goods were insured from the lading of them on board the ship "lost or not lost," and warranted well on a particular day; the ship was lost on that day before the policy was underwritten; and it was holden that the underwriter was liable; for the warranty is complied with, if the ship were safe at any time of that day.

This was an action on a policy of insurance on goods from the lading of them on board the ship at London, to Liverpool, "lost or not lost"; at the bottom of the policy was added "warranted well, December 9th, 1784." At the trial at the last Guildhall sittings before Lord Kenyon, it appeared that the defendant underwrote the policy between one and three o'clock in the afternoon of that day, and that the ship was lost about eight o'clock the same morning. A nonsuit was entered, with liberty for the plaintiff to move to enter the verdict for him, in case the court should be of opinion that he was entitled to recover on the above facts.

A rule to that effect having been obtained,

Lord Kenyon, Ch. J. The single question is whether the warranty at the bottom of the policy means warranted well at the time when the defendant subscribed it or any time on that day. And we are all of opinion that if the ship were well at any time of that day, it is sufficient; and the underwriter is consequently liable.

Ashurst, J. This is the only way of giving effect to all the words of the policy. The underwriter insured the goods on board the ship "lost or not lost"; but the assured engaged that she was safe on some part of that day.

Buller, J. The nature of a warranty goes a great way to determine this question. It is a matter of indifference whether the thing warranted be or be not material, but it must be literally complied with; and if be so, that is sufficient. Here the ship was warranted safe on the 9th of December, and there was great reason for inserting these words, because they protected the underwriter against all losses before that day; to which he would otherwise have been liable, as the policy was on the goods from the lading of them on board the ship.

Grose, J. If this were not the true construction of the warranty, one underwriter might be liable and another not, though they both executed the same policy on the same day. Rule absolute.

HUGUENIN v. RAYLEY.

Common Pleas, 1815. 6 Taunt. 186.

Concealment.

This was an action upon a policy of insurance subscribed by the Albion Insurance Company upon the life of Elizabeth Swayne. Upon the trial of the cause at the Sarum spring assizes, 1815, before Dampier, J., one defense was, that there had been a fraud in effecting the policy by the suppression of a fact which the contract required the assured to disclose. It appeared that E. Swayne, who had been many years resident in a house of her own in the parish of Fisherton Anger, but was in December, 1813, a prisoner for debt in the county jail in Fisherton Anger, then employed Mather to effect an insurance on her life with the defendants; one condition of the insurance was, that a declaration should be made of the state of the health of the life insured,

and Mather, reciting that he had proposed on the behalf of Elizabeth Swayne of Fisherton Anger an insurance on her life, which had been accepted on the declaration then following, declared that E. Swayne did not exceed the age of sixty-six years, and that she was then resident as above; it was stipulated that the policy should be valid only if the statement were free from all misrepresentations or reservation. For the purpose of ascertaining the state of her health, Mather, by the direction of the defendants, called in a physician, who found the subject in the jail, which is in a situation perfectly healthy, confined in a large, airy room, well calculated to preserve the health of its inhabitants. She was apparently about sixty years of age, a fresh-looking, healthy, hale woman, making allowances for her confinement; for confinement makes some difference in the state of health. He certified that she was in good health, and he would have noticed on his certificate the fact of her being in jail, had he not been led by the circumstances of Mather's speaking of the defendants by the term of "our office", to suppose he was an agent of the defendants, and that all which he knew would be communicated, for the witness thought it a fact material to the terms of the contract to be communicated. Upon this evidence, Dampier, J., thought, that Mather had by contrivance prevented the physician from stating a fact to the defendants, which he thought material to the contract, and he therefore stopped the plaintiff's case, and without hearing the defendant's case directed a nonsuit.

Best, Serjt., in this term obtained a rule nisi to set aside the nonsuit and have a new trial; he urged that the contract did not require any statement respecting the state of the party's liberty, or confinement; the defendants required precise and particular information respecting certain facts; and the least misstatement on those facts would, he admitted, be fatal; but the assured was not bound to disclose facts which were not inquired of, and it would be a dangerous doctrine to encourage; it would render necessary that an assured should furnish the insurers with a minute history of his whole life; there was a manifest distinction between

misrepresentation and silence. Some insurance officers require by their contract that everything should be certified that was material to the risk; but that was not the case here; and therefore although imprisonment might, as the physician stated, in a slight degree increase the risk, that could not invalidate the contract between the parties; at all events, if the holding back a material fact would avoid the policy, it was a question that ought to have been left to the jury, whether the imprisonment were a material fact, and the defendant ought to have had the opportunity of bringing evidence before the jury to show that it was immaterial. The court granted a rule nisi.

Lens, Serjt., now showed cause against this rule. From whatever cause the concealment originated, if there was a concealment of that which it was important should be known, it avoids the policy.. The terms of the declaration induce a belief that the residence in Fisherton Anger was a residence at large there, the physician's evidence is, not only that he thought it important in the construction of the contract, but that, for physical reasons, it was material whether the subject was in prison, and debarred from air and exercise, or not; insomuch that he saw reason for going beyond the matters expressly required by the proposal, so far as to insert the mention of this fact in his certificate, if he had not been misled by the idea that Mather was the agent of the defendants. By the terms "without reservation", the assured was bound to state everything which from its nature could possibly bear on the subject. If this fact had been disclosed, the defendants could have taken medical advice whether the imprisonment would increase the risk. Unless, therefore, the plaintiff could prove that this fact could by no possibility increase the risk (and the nature of things shows the contrary), it ought to have been communicated, and the defendants had a right to have it laid before them that they might form their own judgment thereon. Adjournatur.

On this day the court relieved Best from supporting his rule. They observed that they had examined the documents, and there was nothing express in the terms of the policy

which required the imprisonment to be stated, nor was there an omission of the statement of any matter which the office called for; nevertheless, if the imprisonment were a material fact, the keeping it back would be fatal; but it ought to have been submitted to the jury, whether the omission of the fact relied on was or was not a material omission, therefore there must be a new trial.

PENN MUT. LIFE INS. CO. v. MECHANICS SAVINGS BANK AND TRUST CO.

United States Circuit Court of Appeals Sixth Circuit, 1886.
72 Fed. 413, 19 C. C. A. 286.

Concealment.

The insured was cashier of the Mechanics Savings' Bank and Trust Co. at the time the policy in controversy was issued. At the time the policy was issued he had embezzled funds belonging to the bank in a sum a little less than $100,000. Within six months just prior to his death he had effected insurance on his life in the sum of $80,000. His death was caused by congestion of the brain and other vital organs brought on by mental strain when his crime was discovered. The application for the policy contained certain questions which were answered truthfully by the insured, the application contained the following statement, "in this application no circumstance or information has been withheld touching my past and present state of health and habits of life with which the Penn Mut. Life Ins. Co. ought to be made acquainted." Defense False Warranty.

Taft, Circuit Judge. * * * For the error in excluding evidence * * * the judgment herein must be reversed. The case will doubtless be tried again, however, and it becomes our duty, therefore, to examine and decide other questions made upon this record by the defendant which must of necessity arise again on the second trial. * * *

If Schardt was not required by any specific question to disclose the fact of his embezzlements, the policy would still be avoided, if it were material to the risk, and he intentionally concealed it from the company. This is not controverted. The issue of law between the parties is whether the policy would not be avoided, even if his failure to disclose it were due, not to fraudulent intent, but to mere inadvertence or a belief that it was not material. It is insisted for the plaintiff in error that the motive or cause of the non-disclosure is unimportant, if the fact be found material to the risk, and was known to the insured when he obtained the insurance. The trial court took the other view and instructed the jury accordingly. If this were a case of marine insurance, the contention for the plaintiff in error must certainly be sustained. The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has led many courts of this country to modify the rigor of the doctrine in its application to fire and life insurance, and to lean toward the view that no failure to disclose a fact material to the risk not inquired about will avoid the policy, unless such non-disclosure was with intent to conceal from the insurer a fact believed to be material, that is, unless the non-disclosure was fraudulent. In marine insurance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge, from which the probability of loss could be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence. In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually where the insurer can send its agents to give it a thorough examination and determine the extent to which it is exposed to danger of fire from surrounding buildings or because of the plan or material of its own structure. The subject of life insurance

is always present for physical examination by medical experts of the insurer, who often acquire by lung and heart tests and by chemical analysis of bodily excretions a more intimate knowledge of the bodily conditions of the applicant than he has himself. Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning himself and his ancestors, but he is also subjected to an extended examination concerning his bodily history. This was true in the case at bar. When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination has covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk and actually is so, for fear it would induce a rejection of the risk, or what is the same thing, with fraudulent intent.

A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely if ever arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge, it is claimed, avoid the policy is closed. The application is generally prepared, and the questions are generally answered under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's strong motive for securing the business, there is danger that facts communicated to him may not find their way into the application. With re-

spect to a contract thus made, it is clearly just to require that nothing but a fraudulent non-disclosure shall avoid the policy. Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere non-disclosure is itself strong evidence of a fraudulent intent. Thus if a man about to fight a duel should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the non-disclosure. On the other hand, where men may reasonably differ as to the materiality of a fact, concerning which the insurer might have elicited full information and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice.

In England, the tendency of the courts has been to hold that the same rules apply to fire and life insurance as to marine insurance, in reference to the effect of the concealment of material facts. * * *

The rule had its origin in the peculiar exigencies of a very speculative business; to wit, marine insurance. To enforce it in respect to life insurance is to transfer the result of a usage prevailing in one branch of business to another where the conditions are very different, and are of a character that prevents the possibility of the existence of a definite usage well known to both parties in respect to the contracts made. It is the business of shipowners and their brokers frequently to deal in insurance, and they may be presumed to know the usages prevailing with respect to contracts that they are constantly making. In life insurance the insured never

makes a business of taking such insurances, and in most cases he takes but one policy. * * *

Coming now to the American authorities, we find very early in reported cases a disposition to depart from the strict rules of marine insurance law in the consideration of life and fire policies. * * *

In Massachusetts in the earlier authorities, the stringent rule of marine insurance as to concealments was declared applicable with all its rigor to fire policies. In Curry v. The Commonwealth Ins. Co., 10 Pick. 535, it was held that if the insured did not communicate facts within his knowledge which increased the risk, though he was not questioned concerning them, and though he supposed the facts not to be material, the policy was void. This can hardly be reconciled with the later cases in the same court. In Washington Mills Emery Mfg. Co. v. Weymouth and Braintree Mutual Fire Ins. Co., 135 Mass. 503, 505, the question was whether a failure to state that the insured did not own the land on which the building stood avoided the policy. No fraud appeared. The court said: "The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect "citing Commonwealth v. Hide and Leather Ins. Co., 112 Mass. 136; Fowle v. Springfield Fire and Marine Ins. Co., 122 Mass. 191; Walsh v. Fire Association of Philadelphia, 127 Mass. 383. Nor does Chief Justice Shaw's definition of concealment in a fire insurance case seem to be as broad as that prevailing in marine insurance. In Daniels v. Hudson River Fire Ins. Co., 12 Cush. 416, 425, he said, in defining the term as used in a fire policy: " 'Concealment' is the designed and intentional withholding of any fact material to the risk, which the assured, in honesty and good faith, ought to communicate to the underwriter; mere silence on the part of the assured, especially as to some matter of fact

which he does not consider it important for the underwriter to know, is not to be considered as such concealment." There are many other cases of fire insurance in which it is held that a non-disclosure of a material fact not inquired about does not avoid the policy unless it appears to have been withheld with fraudulent intent. Alkan v. The New Hampshire Ins. Co. 53 Wis. 136; Van Kirk v. The Citizens' Ins. Co. of Pittsburg, 79 Wis. 627; Wytheville Ins. Co. v. Stultz, 87 Va. 629, 636; Sanford v. The Royal Ins. Co., 11 Wash. 653; Pelzer Mfg. Co. v. St. Paul F. & M. Ins. Co. 41 Fed. Rep. 271.

The number of life insurance cases in which the question has arisen is small. In Rawls v. The American Mutual Life Ins. Co., 27 N. Y. 282, 287, the Court of Appeals held that where an applicant for life insurance fully and truly answered all questions put to him by the company the mere omission to state matter, though material to the risk, would not be a concealment, and would not affect the validity of the policy on the ground that the applicant might presume that the insurer had questioned him on all subjects which he deemed material. In Mallory v. The Travelers' Ins. Co., 47 N. Y. 52, 57, the same court sustained a charge to the jury, that, if the applicant did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. See, also, Cheever v. The Union Central Life Ins. Co., 4 Am. L. Rec. 155.

In Vose v. The Eagle Life and Health Ins. Co., 6 Cush. 42, 48, the Supreme Judicial Court of Massachusetts announced the principle as applicable to life policies, that the concealment of a material fact will avoid the policy, though it is the result of accident or negligence, and not of design. The case did not call for the application of such a principle. The applicant was asked if he was afflicted with any disease. He answered that he was not. At the time he had consumption, and had experienced several of the premonitory symptoms. His answers were made the basis of the policy.

It is probable that the term "concealment," as used in this case, refers to an incomplete answer to a general question, rather than a failure to volunteer a fact not asked for

because the court uses in the opinion language which is incorporated in the headnote, as follows: "It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions, applicable to all men, are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers at the time of effecting the policy which would elicit that fact, will vitiate the policy." But, whatever the effect of this case, we think the modern tendency, even of Massachusetts decisions, is to require that a non-disclosure of a fact not inquired about shall be fraudulent, before vitiating the policy; and, as already stated, this view is founded on the better reason. The subject is by no means as clear upon the authorities as could be wished, and the text writers find much difficulty in reconciling the cases. May on Insurance (3d Ed.), Nos. 202, 203, 207. We hold that the charge of the circuit court upon this question was correct. * * *

For the error already referred to in the exclusion of evidence, the judgment of the circuit court is,

Reversed, with instructions to order a new trial.

ROSS v. BRADSHAW.

Nisi Prius, 1761. 2 Park Ins. (8th ed.) 933.

Warranty of Good Health.

In an action on a policy made on the life of Sir James Ross for one year from October, 1759, to October, 1760, warranted in good health at the time of making the policy; the fact was, that Sir James had received a wound at the battle of La Feldt, in the year 1747, in his loins, which had occasioned a partial relaxation or palsy, so that he could not retain his urine or foeces, and which was not mentioned to the insurer. Sir James died of malignant fever within the

time of the insurance. All the physicians and surgeons, who were examined for the plaintiff, swore that the wound had no sort of connection with the fever; and that the want of retention was not a disorder, which shortened life, but he might, notwithstanding that, have lived to the common age of man; and the surgeons who opened him said that his intestines were all sound. There was one physician examined for the defendant, who said the want of retention was paralytic; but being asked to explain, he said it was only a local palsy, arising from the wound, but it did not affect life; but on the whole he did not look upon him as a good life.

Lord Mansfield. The question of fraud cannot exist in this case. When a man makes insurance upon a life generally, without any representation of the state of the life insured, the insurer takes all the risk, unless there was some fraud in the person insuring, either by his suppressing some circumstances, which he knew, or by alleging what was false. But if the person insuring knew no more than the insurer, the latter takes the risk. In this case there is a warranty, and wherever that is the case it must at all events be proved, that the party was a good life, which makes the question on a warranty much larger than that on fraud. Here it is proved that there was no representation at all as to the state of life, nor any question asked about it, nor was it necessary. Where an insurance is upon a representation, every material circumstance should be mentioned, such as age, way of life, etc. But where there is a warranty, then nothing need be told; but it must in general be proved, if litigated, that the life was, in fact, a good one, and so it may be, though we have a particular infirmity. The only question is, "Whether he was in a reasonable good state of health, and such a life as ought to be insured on common terms?"

The jury, upon this direction, without going out of court, found a verdict for the plaintiff.

LONDON ASSURANCE v. MANSEL.

Chancery Division, 1879. 11 Ch. D. 363.

False statements as to Habits of Insured.

This was an action by the plaintiffs, who were duly incorporated by the name of "The London Assurance," and were empowered to grant assurances on lives, to set aside an agreement to grant a policy of life assurance to the defendant.

On the 16th of August, 1878, the plaintiffs, on the application of the defendant's solicitor, sent him forms of proposal for life assurance, and on the 20th of August, 1878, the defendant left with the plaintiffs at their office a proposal for assurance on his life for £10,000 filled up on one of the plaintiff's forms of proposal, and signed by the defendant. The questions and answers contained in this proposal, so far as material, were as follows:—

Questions:	Answers:
"Are you now and have you always been of temperate habits?"	"Yes."
"State if there be any other material circumstance affecting your past or present state of health or habits of life to which the foregoing questions do not extend."	"Not to my knowledge."
"Has a proposal ever been made on your life at any other office or offices? If so, where?" "Was it accepted at the ordinary premium, or at an increased premium, or declined?"	"Insured now in two offices for £16,000 at ordinary rates. Policies effected last year."

At the foot of the proposal the defendant signed the following declaration: "I declare that the above written particulars are true, and I agree that this proposal and declaration shall be the basis of the contract between me and the London Assurance."

On the same day the defendant had an interview with the medical officer of the plaintiffs, and in reply to his inquiries gave substantially the same answers as those in the proposal before stated.

The plaintiffs being, as they alleged, satisfied with and relying upon the said proposal, and with the report of their medical officer, and with the answers they had received from two friends of the defendant to whom he had referred them, sent to the defendant's solicitor a written acceptance of the proposal for an assurance of £10,000 on the defendant's life, and, on the 23d of August, 1878, received from him a check for the first year's premium, and on the 24th of August, 1878, the plaintiffs sent him the usual certificate as to the assurance being effected.

The plaintiffs alleged that shortly after the last-mentioned date, they discovered that, though the defendant's life had been assured for £10,000 in the Rock Life Assurance Company, and also for £16,000 in the Equity and Law Life Assurance Society, the last-mentioned assurance society had in November, 1877, when the defendant applied for a further assurance of £3,000 decided not to increase the amount at risk on his life; also that the defendant had shortly afterwards made proposals to the Scottish Equitable Society and to the Crown Insurance Society, who had respectively declined his proposals, to the North British and Mercantile Insurance Society, which proposal was withdrawn, and to the Liverpool, London, and Globe Company, by whom the proposal was not accepted; that in June, 1878, the English and Scottish Law Life Assurance Association, after accepting a proposal for an assurance of £5,000 on the life of the defendant, had refused to proceed with it on learning that the Equity and Law Life Society had declined the further assurance of the defendant's life; also, that in August, 1878, the defendant had applied for assurances on his life to the Clerical, Medical, and General Life Assurance Society, to the Scottish Amicable Assurance Society, and the Law Life Assurance Society, but that each of the said offices had declined his proposals.

The plaintiffs alleged that they thereupon determined not to proceed with the assurance, and that their soliciters wrote

to the defendant's solicitor to that effect, and sent a check for the amount of the premium, which was returned by the defendant.

The plaintiffs then brought their action, setting out in their statement of claim the facts before stated, and alleging that it was the duty of the defendant to have informed them that his life had been refused by the said several offices; that such fact was a very material fact in a contract of life assurance, and that the plaintiffs would not have entertained the defendant's proposal for assurance had he informed them that his life had been refused by other offices, which the defendant had concealed.

The plaintiffs claimed in the declaration that the acceptance by the plaintiffs of the defendant's proposal for assurance on his life for £10,000, and the contract by the plaintiffs for the assurance on the life of the defendant, were void.

The defendant, by his statement of defence, admitted the plaintiffs' allegations as to the proposal and as to the two policies that had been effected; also that the Equity and Law Life Society had decided not to increase their risk, the reason being that they considered their risk sufficiently large. With regard to other proposals, the defendant stated as follows:

"The defendant admits that proposals were made to the Clerical, Medical, and General Life Assurance Society, the Scottish Amicable Life Assurance Society, and the Law Life Assurance Society, for an assurance on his life, and such proposals were declined without any medical examination."

In paragraph 15 he stated as follows: "The defendant is not and never has been of intemperate habits of life, and although proposals for assurances on the defendant's life had been made to and declined by the several offices in the statement of claim mentioned, the defendant's life was never rejected by an office, but was passed as a first-class life by every medical officer who examined him." The defendant also stated that the English and Scottish Law Life Assurance Society passed his life as a first-class life, but they reserved the right of declining to complete the transaction at any time before the receipt of the premium; but that, having learned that the Equity and Law Life Assurance Society had decided not to in-

crease their risk on the defendant's life, and would not take any part of the new risk, exercised their right of declining to complete the transaction.

The defendant submitted that there had been no concealment such as to vitiate the contract.

The case was heard on motion for judgment on admissions in the pleading.

Jessel, M. R. The action in this case is to set aside an agreement for assurance for life on the ground of concealment of a material fact in effecting the assurance.

The first question to be decided is, what is the principle on which the court acts in setting aside contracts of assurance? As regards the general principle, I am not prepared to lay down the law as making any difference in substance between one contract of assurance and another. Whether it is life, or fire, or marine assurance, I take it good faith is required in all cases, and though there may be certain circumstances from the peculiar nature of marine insurance which require to be disclosed, and which do not apply to other contracts of insurance, that is rather, in my opinion, an illustration of the application of the principle than a distinction in principle.

But I think the law has been laid down very often, and I am going to refer to two or three statements of it, which at all events are binding on me.

In the case of Dalglish v. Jarvie, 2 Mac. & G. 231, 243, a case which had nothing to do with insurance, but which referred to the principles on which a special injunction ought to be granted ex parte, Lord Cranworth, then the Lord Commissioner Rolfe, says this: "Upon one point it seems to me proper to add thus much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, 'uberrima fides.' In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals anything that he knows to be material, it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he

does not know that it would have that effect, such concealment entirely vitiates the policy.

Now I come to the facts of the case, which certainly appear to me to be very plain and clear indeed. The office of the London Assurance asks these questions: "Has a proposal ever been made on your life at any other office or offices; if so, where? Was it accepted at the ordinary premium, or declined?" and there is an agreement at the end, "That this proposal and declaration shall be the basis of the contract between the assured and the company." Here is the answer: "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." It is to be observed that the man proposing the assurance, who knows the facts, does not answer the question. The question was, "Has a proposal been made at any office or offices; if so where?" He does not state, "I proposed to half a dozen offices," which was the truth, but simply says, "Insured now in two offices," which of course must have been intended to represent an answer, and therefore would mislead the persons receiving it, who did not look at it with the greatest attention, into the belief that he was insured in two offices, and that they were the only proposals that he had made. "Was it accepted at the ordinary premiums, or an increased premium?" His answer is, "At ordinary rates." That is the answer to the second branch of the inquiry, but he has not answered the question, "or declined?" The inference, therefore, which must have been intended to be produced on the mind of the person reading the answer was that it had not been declined. And in my opinion that is the fair meaning of the answer, and the assured is not to be allowed to say, "I did not answer the question." But if it were so, it would make no difference, because if a man purposely avoids answering a question, and thereby does not state a fact which it is his duty to communicate, that is concealment. Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact.

The question is whether this is a material fact. I should say, no human being acquainted with the practice of companies or of insurance societies or underwriters could doubt for a

moment that it is a fact of great materiality—a fact upon which the offices place great reliance. They always want to know what other offices have done with respect to the lives. But in this case there could be no question as to its materiality. In the first place, we have this in the answer: "The defendant admits that proposals were made to the Clerical, Medical, and General Life Assurance Society, the Scottish Amicable Life Assurance Society, and the Law Life Assurance Society for an assurance on his life, and such proposals were declined." There are three proposals as admitted by the answer declined in the very words of the question; and then he goes on (His Lordship then stated paragraph 15 of the answer, and added): We have an admission by the defendant that no less than five insurance offices had declined to accept his life.

Now, to suppose that any one who knows anything about life insurance, that any decent special juryman could for a moment hesitate as to the proper answer to be given to the inquiry, when you go to the insurance office and ask for an insurance on your life, ought you to tell them that your proposals had been declined by five other assurances offices? is, I say, quite out of the question. There can be but one answer—that a man is bound to say, "My proposals have been declined by five other offices. I will give you the reasons, and show you that it does not affect my life," as he admits it to be by this answer; but of that the office could judge. There can be no doubt, as a proposition to be decided by a jury, that such a circumstance is material. But in fact I have elements here admitted on the pleadings for deciding that question quite irrespective of the ordinary knowledge of the practice of mankind in respect to these matters which is to be imputed to a good special juryman, because I have here two things admitted, first of all, that the proposal which forms the basis of the contract asks a question, Has a proposal been declined?

Now, where it is to form the basis of the contract it is material, because, as was held in a case in the House of Lords of Anderson v. Fitzgerald, 4 H. L. C. 484, where it is part of the contract, the other side cannot say it is not material. So here we have the proposal as the basis of the contract.

It is impossible for the assured to say that the question asked is not a material question to be answered, and that the fact which the answer would bring out is not a material fact. Further, we have this, that within the defendant's own knowledge the English and Scottish Law Life Assurance Society having accepted his life, which had been duly passed by their medical officer as a first-class life after examination, and merely reserving a right to decline when they found that one other office, not five, but one, had declined the life, or rather the proposal, at once withdrew from their acceptance and declined his proposal. So that the defendant had the strongest reasons for believing from actual knowledge that the fact of a proposal having been declined was a most material circumstance, and would have the greatest effect on the mind of the proposed assurers.

It seems to me a very plain and clear case, and that the plaintiffs are consequently entitled to judgment.

The order will be—The plaintiffs being willing and hereby offering to return the premium, declare that the acceptance by the plaintiffs of the defendant's life was void and of no effect, that they were not bound to deliver the policy, and that the contract be delivered up to be cancelled.

THE UNION MUTUAL LIFE INSURANCE CO. OF MAINE, Plff. in Err., v. HENRY WILKINSON.

Supreme Court of the United States. 13 Wal. 222, 20 Law Ed. 617.

Representations of No Injury.

Mr. Justice Miller delivered the opinion of the court:—

This was an action on a policy of insurance, obtained by defendant in error on the life of his wife, from the Corporation which is here as plaintiff.

The making of the policy and the death of the wife being admitted, the defendant below assumed the burden of a de-

fense, which rested upon the falsehood of certain answers to questions found in the application of plaintiff.

By terms of the policy it became void if any of those representations proved to be untrue. The plea of defendant sets up some ten or twelve of these responses as false, but the questions presented here, relate to but two of these.

In answer to interrogatory No. 9—"Has the party ever had any serious illness, local disease or personal injury; if so, of what nature, and at what age?"—the parties answered, "No."

In regard to this the defendant asserted, that in the year 1862, some five or six years before the application was made, and when the wife was about fourteen years old, she had been seriously injured by a fall from a tree.

Under a rule of practice in the State Court of Iowa, adopted by the Circuit court of that district, the judge required the jury to respond to the following interrogatory:

"Did Malinda Jane Wilkinson (the wife) in the year 1862, receive a serious personal injury by falling from a tree?" To which they answered, "Yes; injured, not seriously."

As the defendant concedes that to defeat the action the injury must have been serious, the response of the jury would seem to be conclusive. But the counsel for the defendant argue that the jury was misled in making this response by the instruction of the court on that subject, and by the further question which it propounded to them in regard to the same matter. This other question is thus stated in the record:"Were the effects of such fall temporary, and had these effects wholly passed away without influencing or affecting her subsequent health, or length of life, prior to the time when the application for insurance in this case was taken? To this the jury answered "Yes."

And on this branch of the case the court said to the jury that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life then the non-disclosure of the fall was no defense to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall

affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

It is insisted by counsel for the defendant that if the injury was considered serious at the time, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was a mistake. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

On the other hand, when the question arises, as in this case, on a trial, the jury and not the insurer must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed.

Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed

the jury to decide the interrogatory propounded to them. Wilkinson v. Conn. Mut. Life Ins. Co., 30 Ia., 119.

The other answer, which defendant alleges to have been false, is made to an inquiry as to the age of the mother at the time of her death, and the disease of which she died.

The application shows that it was answered that she died at forty, of a fever. Evidence was given by the defendant, tending to prove that she died much younger, of consumption. In avoidance of this, plaintiff was permitted to prove that the agent of the Insurance Company, who took down the answers of the applicant and his wife to all interrogatories, was told by both of them that they knew nothing about the cause of the mother's death, or her age at the time; that the wife was too young to know or remember anything about it, and the husband had never known her. But that there was present at the time the agent was taking the application, an old woman who said she had knowledge on that subject, and that the agent questioned her for himself, and from what she told him he filled in the answer which is now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife. The jury find this in their special verdict, and also find that the mother died at the age of twenty-three years, and did not die of consumption. The husband and wife had all been slaves, and it is found that the applicant did not know when the application was signed, how the answer to the question had been filled in.

And on this subject the court instructed the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statement made to him by others, in answer to inquires he made of them, and upon the strength of his own judgment based upon the data thus obtained, it was no defense to the action to show that the agent was mistaken, and that the mother died at the age of twenty-three years.

To the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject the defendant excepted and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability of misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident or mistake or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the Statute of Frauds, become the instrument of the very fraud it was intended to prevent did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so; and, in fact had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by

some one who was his agent alone in the matter, and forwarded to the principal office of the defendant Corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the Corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is, that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.

It has been applied to the precise class of cases of the one before us in numerous well considered judgments by the courts of this country. Plumb v. Cattaraugus Ins. Co. 18 N. Y., 392; Rowley v. Empire Ins. Co., 36 N. Y., 550; Woodbury Sav. Bk. v. Charter Oak Ins. Co., 31 Conn., 526; Combs v. Hannibal Ins. Co., 43 Mo., 148. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the Insurance Company and not of the plaintiff, in what he did in filling up the application, the Company must be held to stand just as he would if he were the principal.

Although the very well considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send those agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy,

rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, prima facie, co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. Bebee v. Ins. Co., 25 Conn., 51; Lycoming Ins. Co. v. Schollenberger, 44 Pa., 259; Beal v. Ins. Co., 16 Wis., 241; Davenport v. Ins. Co., 17 Ia., 276. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business, for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. Sav. Bk. v. Ins. Co., 31 Conn., 517; Hortwitz v. Ins. Co., 40 Mo., 557; Ayers v. Ins. Co., 17 Ia., 176; Howard Ins. Co., v. Bruner, 23 Pa., 50.

In the fifth edition of American Leading Cases, 917, after a full consideration of the authorities, it is said:

"By the interested or officious zeal of the agents employed

by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement of what the application should contain; or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers." Rowley v. Ins. Co., 36 N. Y. 550.

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

The judgment of the Circuit Court is affirmed.

SATTERLEE v. MODERN BROTHERHOOD OF AMERICA.

Supreme Court of North Dakota. Jan. 25, 1906. 15 N. D. 92.

Application—Warranties.

Engerud, J. This is an action on a benefit certificate or policy of insurance issued by the defendant, a fraternal beneficiary association, to Myrtle Satterlee, who, in her lifetime, was the wife of the plaintiff. The insurance was in the sum of $2,000, payable to this plaintiff upon the death of the insured. The contract of insurance consists of the beneficiary certificate or policy, together with the application of the insured

for membership in the defendant order, and the articles of incorporation, fundamental laws, by-laws, and regulations of the society. The application for insurance contains, among other things, the statements by the insured as to her physical condition made to the medical examiner of the defendant. This medical examination was had on March 12, 1904. The application was accepted, and the beneficiary certificate issued on March 19, 1904. Said Myrtle Satterlee died September 12, 1904, after giving birth to a child on that day, which child was living at the time of the trial in May, 1905. The cause of her death was puerperal eclampsia, a disease caused by childbirth. The insured had been married about five years to the plaintiff, and they had always lived together as husband and wife ever since their marriage.

The contract of insurance, among other things, provides that if the application for membership should be found to be untrue in any respect, the certificate or policy should be thereby avoided. The application, which is expressly made part of the policy of insurance, and referred to in the certificate, is signed by the insured, and among other things recites: "I declare that I am, to the best of my knowledge and belief, in sound physical condition, and I further declare and warrant that the above statements, together with the answers made or to be made in the other parts of the application by me to the physician, are true, and shall form the basis of the contract for membership and certificate between me and my beneficiary and all parties who may at any time have an interest therein and said Brotherhood, and any untrue or fraudulent answers or suppression of facts in regard to my health, personal habits, or physical condition, in this application * * * shall immediately make said benefit certificate null and void." Among other questions appearing in the medical examination, which was in a separate document attached to the application, the applicant was asked if she was then pregnant, to which she answered: "No." In connection with that question there was a clause stating that if the applicant was pregnant, a special waiver in that respect must be signed. At the end of the paper containing the questions and answers of the medical examination was the following: "I hereby further declare

that I have read and understood all of the above questions put to me by the medical examiner, and answers thereto, and that the same are warranted by me to be true;" and the paper bears the signature of the insured.

The principal defense pleaded is that the defendant was not liable on the policy because the statement by the insured in her application, to the effect that she was not then pregnant, was untrue, and was a breach of a warranty contained in the contract. On a trial before a jury the facts already stated were shown, and the plaintiff testified that at the time the application was made, and until about two months afterwards, none of the usual indications of pregnancy had appeared; and that the child, which was born about 12 hours before the mother's death, was small and weak when born, but was still living at the time of the trial. No testimony, unless that just stated can be termed such, was introduced to the effect that the child was in any way undeveloped or that it bore any indication of premature birth. The defendant called as a witness a practicing physician, who testified that a child born at the end of six months from conception could not live more than a few hours. This testimony was not disputed, although the physician who attended the mother at the time of her confinement was present at the trial, and testified on other points in the case. At the close of all the testimony, both parties moved for directed verdicts. The defendant urged that it was entitled to a directed verdict, for the reason that the undisputed evidence showed that at the time the application for membership was made, the applicant was pregnant, and the statements and representations made in the application and certificate were warranties that that condition did not then exist. The plaintiff moved for a directed verdict on the ground that the evidence showed without dispute that the plaintiff's wife did not know that she was pregnant at the time the application for insurance was made. Defendant's motion was not formally denied, but the plaintiff's motion was granted, and a verdict returned accordingly. The defendant did not expressly take any exception to the ruling of the court in directing a verdict. After the directed verdict had been rendered, the defendant applied to the court for judgment in its favor not-

withstanding the verdict. This motion was denied, and a formal exception taken. Thereafter a statement of the case was duly settled, specifying as error the denial of defendant's motion for a directed verdict, the granting of plaintiff's motion, and the denial of the motion for judgment notwithstanding the verdict; and the specifications further specifically point out wherein the evidence is claimed to be insufficient to justify the verdict. Judgment was entered pursuant to the verdict on the 18th of May, 1905. Afterwards, on the 19th day July, 1905, the defendant moved for a new trial on the ground that the evidence was insufficient to justify the verdict and errors of law. The motion was denied, and thereupon the defendant appealed from the judgment alone. The errors assigned include the specification of error embraced in the statement of the case and also the denial of the motion for a new trial. A motion for a new trial in this case was unnecessary because, if the direction of the verdict was erroneous it was an error of law which can be reviewed upon appeal from the judgment without a motion for a new trial. Sanford v. Elevator Co. 2 N. D. 6, 48 N. W. 434.

One of the errors assigned, and it is the only one we need consider, is that "the court erred in denying the motion of defendant for judgment in its favor notwithstanding the verdict." The respondent's contention that the court's action in overruling appellant's motion for judgment cannot be considered because no formal exception was taken to its request for a directed verdict, cannot be sustained. The right to move for judgment notwithstanding the verdict is given by chapter 63, P. 74, Laws 1901. The making of a motion for a directed verdict is a condition precedent to the right to make a motion for judgment. Johns v. Ruff, 12 N. D. 74, 95 N. W. 440. But this act does not require that an exception be taken. In this case, the defendant's motion for a directed verdict was denied. It had the right, therefore, to move for judgment. This motion was made before the judgment from which this appeal is taken was entered, and is therefore properly before us for review. Whether the additional error assigned upon the court's refusal to direct a verdict can or cannot be reviewed because of the absence of a formal exception we

need not determine. The case of DeLendrecie v. Peck, 1 N. D. 422, 48 N. W. 342, is not applicable to this case, and this opinion should not be taken to be an implied approval of the holding in that case to the effect that the direction of a verdict is not a "final decision" deemed excepted to within the meaning of section 5463, Rev. Codes 1899. That question is not discussed because not necessary to the disposition of this case. The error assigned upon the court's refusal to order judgment notwithstanding the verdict presents the same question as that presented upon the motion for a directed verdict, and they are decisive of this case. The statement by the applicant that she was not pregnant was contained in an instrument signed by her, and which was referred to in the policy as constituting part of it. It was also a statement of a material fact relating to the person insured and effecting the risk to be assumed by the insurer. It was also expressly declared to be a warranty by the contract of the parties, and must be given effect as such by the court. Sections 4503-4512, Rev. Codes 1899; Johnston v. Insurance Co., 1 N. D. 167, 45 N. W. 799.

It is unnecessary to decide in this case whether section 4485, Rev. Codes 1899, which was incorporated in our law by the revision of 1895, after Johnson v. Insurance Co. was decided, has modified the rule announced in that case with respect to the effect of the falsity of an apparently immaterial representation which the parties have agreed shall be regarded as a warranty. That section is part of the article dealing with concealments and representations in insurance contracts. It declares: "No oral or written misrepresentation made in the negotiation of a contract or policy of insurance by the insured, or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increased the risk of loss." If we assume that the language of this provision includes representations which have been made as warranties, the act, nevertheless, leaves untouched the law as it previously existed with respect to the effect of an untrue warranty as to a fact, the existence or nonexistence of which increased the risk of loss. If the matter misrepresented increased the risk of loss, it is still wholly im-

material whether the matter was intentionally or innocently misrepresented. The applicant in this case warranted that she was not pregnant. That this warranty was untrue cannot be seriously questioned. That a state of pregnancy materially increased the risk of loss is obvious. It was a material fact which increased the risk of loss; and the warranty with respect to it was untrue, however innocent the applicant may have been of any intentional misrepresentation. The warranty being false, the contract was vitiated; and it follows that the defendant's motion for a directed verdict ought to have been granted. As there is no ground for supposing that a new trial would disclose any different state of facts, a judgment dismissing the action should be entered notwithstanding the verdict. The fact that no formal denial of defendant's motion was entered was immaterial. Under the circumstances of this case the granting of plaintiff's motion was of itself a denial of defendant's motion, and it was wholly unnecessary to so expressly declare on the record.

The judgment appealed from is reversed, and the district court will enter judgment notwithstanding the verdict, that the plaintiff take nothing and that defendant recover its taxable costs and disbursements. All concur.

LEY v. METROPOLITAN LIFE INS. CO. OF NEW YORK.

Supreme Court of Iowa. April 11, 1903. 120 Ia. 203.

Fraud—What Constitutes.

Weaver, J. The policy in suit was issued May 29, 1900, upon the life of William Ley, who died August 19, 1900. The defendant refuses payment, alleging that the said insured, in applying for such insurance, and in order to obtain a favorable report or certificate from the medical examiner, falsely and fraudulently misrepresented his physical condition and history; that in the year 1896 said Ley was afflicted with

a very severe and almost fatal hemorrhage of the stomach (a disease which afterward caused his death), and that, in his examination by and answers to the examiner, he concealed and denied the fact of such sickness, and that by such fraud and deception, in which it is alleged the plaintiff participated, said examiner was induced to certify the fitness of said Ley for insurance; and that such certificate would not have been made, nor would the policy have been issued, had such fraud not been practiced.

It was shown upon the trial that in applying for insurance the applicant signed written answers to questions propounded by the medical examiner bearing upon his physical condition at and prior to that date. Among such questions and answers were the following: "(1) Have you ever had spitting of blood? Ans. No. (2) Give full particulars of any illness you may have had since childhood, and name of medical attendants. Ans. Malaria, 8 years ago. Hawthorn Thornton, Portland, Oregon." "(6) Name and residence of your usual medical attendant. Ans. Have none. (7) Have you consulted any other physician? If so, when and for what? Ans. No." Although defendant took issue upon other answers made to the examiner, those above quoted are all which are material to the consideration of the matters presented in argument. The application, as distinct from the medical examination, is signed by both husband and wife, and, in addition to the usual assertion of the truth of all representations made and answers given, contains the following clause: "And it is expressly consented and stipulated that in any suit on the policy herein applied for, any physician who has attended, or may hereafter attend the insured, may disclose any information acquired by him in any wise affecting the declarations and warranties herein made."

Upon the trial the defendant conceded the issuance of the policy and the death of Ley, and assumed the burden of proof upon its allegations of fraud. In support of this issue, Dr. Stutsman was produced, and testified that he made the medical examination of Ley, and, while he had no independent recollection of many of the answers, was able to testify that he recorded the answers as they were given by

the applicant, and that, if Mr. Ley had disclosed the fact of having been afflicted with hemorrhage a few years before that date, he would have declined to certify him for insurance. On cross-examination the witness stated that he gave Mr. Ley a physical examination, sounded the lungs, listened to the heart action, tested the urine, and found no defects which would render him uninsurable. He appeared to be fairly well proportioned, and had an average appearance of a healthy man.

Dr. Little, a practicing physician, testified that he was called to attend Mr. Ley in 1896. The witness was then asked, "What was Mr. Ley suffering from, doctor?" To this plaintiff objected that the matter called for was confidential, and therefore inadmissible, under the statute; and the objection to this and certain other similar questions was sustained. It appears, however, that the witness, in answer to other questions, was permitted to testify, over plaintiff's objection, that Ley was vomiting black, clotted blood on the occasion referred to, and was quite weak and exhausted. He further testified that he attended Ley in his last sickness, and found him suffering from very profuse hemorrhage of the stomach. Plaintiff, in her own behalf, testified that upon the occasion of Dr. Little's visit in 1896 she caused him to be called in; that her husband had been taken ill while at his place of business, and walked home; that he vomited some, "but not so very much," and that there was no return of the vomiting after the doctor arrived; that the doctor was there only about 10 minutes, and was in again once or twice only for a very brief call; that she was present on both occasions, and that the doctor said nothing to her husband as to the nature of the disease; that Mr. Ley returned to his work in two or three weeks, and thereafter was apparently in good condition, had good appetite, and seemed to increase in weight.

William Reese, who was Ley's business partner, testified that he was present in the room when the medical examination of Ley was made for the purpose of procuring this insurance, and heard more or less of the questions and answers, and that, in answer to the inquiry as to former sickness and treatment by physicians, Ley mentioned to the examiner the name

of a physician in Oregon, and also said that Dr. Little had treated him. The foregoing is the substance of the testimony in the record, except that of certain expert witnesses, which need not be set out at this time.

Much of the appellant's argument is devoted to exceptions taken to the charge of the court to the jury. The length of the charge, and the number of the criticisms made thereon, are such that it is impracticable to set them out at length without unduly extending this opinion, and we shall therefore state them in substance only.

1. The rules given by the court in respect to evidence on which charges of fraud may be sustained are said by counsel to cast upon the appellant a heavier burden than the law contemplates. In support of this contention we are pointed to the following language extracted from the third instruction:

"Fraud will never be presumed, but must be proven by the party charging it; and if the facts upon which it is charged are, or may be, consistent with honesty and purity of intention, then the charge of fraud will fail. To show fraud, the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory."

The general proposition as to the presumption of good faith is conceded to be correct, but it is said, first, that the meaning of the first sentence is confusing, and leaves it doubtful whether the expression "facts upon which it is charged" has reference simply to the allegation of fraud in the pleading, or to the proof offered in support of such allegation; and, second, that the word "clearly," in the next sentence, and the requirement that facts to prove fraud "must be inconsistent with any other reasonable or probable theory," call for a higher degree of proof than should have been exacted. The first sentence, in substance, is copied from an instruction approved by us in Kenosha Stove Co. v. Shedd, 82 Iowa, 540, 48 N. W. 933. We think it is not open to the objection made. No ordinary reader or juror would be apt to construe it otherwise than a statement of the general principle, often announced, that the presumption of good faith in human transactions is not overcome by proof of facts and cir-

cumstances which are consistent with honesty and integrity of purpose. Hamilton v. Bishop, 22 Iowa, 211; Schofield v. Blind, 33 Iowa, 175; Prichard v. Hopkins, 52 Iowa, 120, 2 N. W. 1028; Lyman v. Cessford, 15 Iowa, 232. The second sentence quoted from the instruction is neither more nor less than a restatement in another form of the principle embodied in the first, and, as used by the court, we think the proposition is not erroneous. It is possible that the word "clearly," in that connection, if considered without reference to the charge as a whole, might be thought objectionable, as requiring proof beyond a doubt; and, if such were the effect here, the appellant's point would be well made. Such, however, would be an extreme and unfair interpretation of the court's meaning. The court was not instructing as to quantum of proof necessary to establish the defense pleaded, for that undoubtedly required only a fair preponderance of the evidence; and this, in express words, was so stated in another part of the same paragraph. But the alleged false statement in the application and examination of the insured person is not, strictly speaking, the defense offered, but is rather one of the facts which must be shown in support of the defense. To avoid the policy, it was necessary not only to show the fraud alleged, but that defendant was thereby deceived, and, in reliance upon the truth of the representations, issued the policy which it seeks to avoid. To establish such evidentiary fact of bad faith, falsehood, or deception, it is held in a multitude of cases that the proof must be "clear," "satisfactory," "convincing." Schofield v. Blind, 33 Iowa, 175; Prichard v. Hopkins, 52 Iowa, 120; 2 N. W. 1028; Dirkson v. Knox, 71 Iowa, 728, 30 N. W. 49; Kellogg v. Aherin, 48 Iowa, 299; N. Y. Ins. Co. v. Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; Paxton v. Boyce, 1 Tex. 317; Rabbit v. Dollen, 14 Nev. 19; McCarthy v. White, 21 Cal. 495, 82 Am. Dec. 754; Herring v. Wickham, 29 Grat. 628, 26 Am. Rep. 405; White v. Trotter, 53 Am. Dec. 112; Buck v. Sherman, 2 Doug. 176; Lavassar v. Washburne, 50 Wis. 200, 6 N. W. 516; Raymond v. Cox, 44 N. J. Eq. 415, 15 Atl. 593. See, also, the rule stated and authorities cited in 14 Am. & Eng. Ency. Law (2d Ed.) 190. The distinction we have noted between the

rule as to preponderance of evidence upon the ultimate issue and the rule as to the sufficiency of testimony to establish the fact of fraud has already been recognized by us in Bixby v. Carskaddon, 55 Iowa, 555, 8 N. W. 354. It is in the sense approved by the foregoing authorities that the district court must be understood in the paragraph under consideration, and the assignment of error thereon cannot be sustained.

2. Exception is also taken to paragraph 6 of the charge, in which the jury were instructed that:

"If it is shown by the fair preponderance of the evidence that, in his answer to any one or more of the interrogatories which are charged by the defendant as having been untruthfully answered, the applicant, William Ley, answered them, knowing at the time that the answer so given by him was false and untrue, or if he in making such answers, or any one of them, knowingly concealed any fact which he was in good faith at the time required to state, then the plaintiff cannot recover." It is said that this, in effect, requires the company not only to show that the answers of the applicant were untrue, but also to show that he knew them to be untrue, when, according to the correct rule, a good defense would be made by simply proving that the answers were false. What we might hold the law to be on this question if the issue here presented involved merely the truthfulness of answers or representations by the applicant in the nature of "warranties," we need not consider and it is to such representations that the authority cited by appellant relates. Sweeney v. Ins. Co. (R. I.) 36 Atl. 9, 38 L. R. A. 297, 61 Am. St. Rep. 751. We have in this state a statute which provides that the issuance of a certificate of health by the medical examiner estops the company from alleging or proving that the insured person was not in the condition of health required by the policy at the time the insurance was effected, unless the same was procured by or through the fraud or deceit of the assured. Code, §1812. This serves to exclude the technical defenses which were formerly available, based on the doctrine of warranties as to the health and history of the insured person. To escape liability because of the uninsurable condition of the applicant's health or medical

history, the insurer is required to show that the policy or health certificate was procured by fraud. It is a rule too well understood to require citations of authorities that the party alleging fraud must prove it. Now fraud has a well-defined meaning in law. For the purposes of this case, it may be said to be "a false representation of fact, with knowledge of its falsity, and with intent that it be acted upon, when the person to whom it is made acts upon it, and by so doing suffers an injury." 14 Am. & Eng. Ency. Law (2d Ed.) 21; Watson v. Poulson, 7 Eng. Law & Eq. 588; Byard v. Holmes, 34 N. J. Law, 296; Avery v. Chapman, 62 Iowa, 144, 17 N. W. 454; Allison v. Jack, 76 Iowa, 205, 40 N. W. 811. In Brackett v. Griswold, 112 N. Y. 467, 20 N. E. 376, the definition is compressed into these words: "Representation, falsity, scienter, deception, injury." It follows, therefore, that proof of the falsity of the representations is proof of but one of several elements, each of which is essential to constitute fraud, and the burden is not removed from the party asserting it until all are established by the evidence. If it be said that a representation may be made under such circumstances that, if false, we may safely conclude that its falsity was known to the party making it, the point can be conceded without affecting the rule as to the burden of proof. To establish its defense, it was incumbent on the defendant to prove not simply that the answers of the applicant were untrue, but that he knew them to be untrue, and thereby obtained the insurance. It is argued that, if the answers are found to be untrue, there is a presumption that the applicant knew it and intended to deceive. This, we think, is not the law. On the contrary, the law raises no presumption of knowledge on the part of the party making the representation from the mere fact that the representation is untrue. See note to Cottrill v. Krum, 18 Am. St. Rep. 560. The extent of the rule, so far as applicable, to this case, is well stated in Hammat v. Emerson, 46 Am. Dec. 602, cited by appellant, as follows: "When one has made a false representation, knowing it to be false, the law infers that he did so to deceive." In other words, there is no presumption of an intention to deceive from the mere fact that a statement made is not true; such presump-

tion arising only when it appears that the statement is made with knowledge of its falsity. The giving of the sixth instruction was therefore not erroneous. Objections are urged to other instructions on different grounds, the most material of which are governed by the conclusions already stated, or involve propositions of no general interest to the profession. We have examined each point made with the care which the importance of the case merits, and find the law as stated by the district court to be in substantial accord with our prior holding, and such as was applicable to the issues and the evidence given on the trial.

3. Error is assigned upon the ruling of the trial court in sustaining the objections made to the testimony of Dr. Little concerning his treatment of Mr. Ley in 1896. It will probably not be disputed that the testimony called for was privileged under the provisions of our statute (Code, § 4608); but it is said that by reason of the "waiver" contained in the application, and hereinbefore quoted, this prohibition does not apply. The question which is here sought to be raised is one of considerable importance, but the record before us does not seem to make necessary any decision thereof at this time. While it is true that plaintiff's objection to the testimony of Dr. Little was at first sustained, the witness did later testify as to the professional visits made by him in the year 1896, and stated quite fully what he claimed to have discovered concerning the physical condition of Mr. Ley at that time, and as to the nature of the illness from which said insured was then suffering. Moreover, it further appears from the record that when plaintiff interrogated this same witness as to what occurred upon his visit to Ley in 1896, and especially as to what he (the physician) told Ley concerning the nature of his ailment, such testimony was excluded upon the appellant's objection. If there was any error in the first ruling, which we do not decide, it was cured by the testimony afterward admitted; and, in any event, appellant cannot complain of the exclusion of evidence which its own objection has assisted in keeping out of the record.

4. Appellant further insists that the verdict and special findings returned by the jury have no sufficient support in the

evidence. Without taking the time or space to analyze the testimony, we have to say that, in our judgment, the record does not justify us in disturbing the result below upon this ground. Unquestionably, there is evidence tending to show that in 1896 Mr. Ley had hemorrhage of the stomach, and that if such fact had been stated upon his medical examination the policy would not have been issued. On the other hand, there was evidence from which the jury could believe that Mr. Ley did not know or understand the nature of the attack, and that in making his answers to the questions put to him by the examiner he acted in good faith. It was not for the plaintiff to prove good faith in order to recover, for, in the absence of proof to the contrary, good faith is presumed; but it was for the defendant, in order to defeat recovery, to prove the alleged bad faith. The question whether the presumption in plaintiff's favor had been overcome, and the affirmative defense established, could not be arbitrarily disposed of by the court, but was properly left to the jury; and we cannot say that its verdict is so clearly the product of prejudice or passion that we should order a new trial.

We find no reversible error in the record, and the judgment of the district court is affirmed.

DWYER v. MUTUAL LIFE INS. CO. OF NEW YORK.

Supreme Court of New Hampshire. June 7, 1904.
72 N. H. 572.

Warranty—Effect—Application.

Parsons, C. J. The defendants deny liability upon the policy of insurance in suit, upon the ground that the undisputed evidence discloses a breach of an express warranty in the contract, necessarily fatal to its validity as matter of law. They further contend that the evidence does not disclose such insurable interest in the plaintiff as to enable him to maintain the action. The exception to the verdict ordered for the de-

fendants raises the question whether there was any evidence which should have been submitted to the jury upon each proposition.

In the absence of statutory prohibition, of which no claim is made, "parties to insurance, like parties to other contracts, may * * * incorporate into their contract such conditions, whether apparently material or immaterial, as they see fit. If the assured has in express terms stipulated and warranted that a certain fact is true, that warranty makes the fact a material one, and, however immaterial it may seem in other respects, an indispensable condition in the contract. * * * 'Such express warranty is always a part of the policy, but, like any other part of the express contract, may be written in the margin, or contained in proposals or documents expressly referred to in the policy, and so made a part of it.' * * * But while this unquestionable effect is given to express warranties or conditions, when ascertained, it is a well-established doctrine of the law of insurance that not every representation made by the assured in his application or treaty for a policy is of that nature. In order to have such an effect, the representation must be material, or * * * the fact represented must be 'one upon which the parties can be presumed to have proceeded in making the contract.' * * * 'A false representation cannot avoid the policy, unless it be on a point material to the risk.' " Boardman v. Insurance Co., 20 N. H. 551, 555. As to the foregoing principles, there is no controversy in the authorities. The falsity of a statement which the parties have expressly warranted to be true, or agreed shall constitute a material part of the contract, avoids the policy; while, if the parties have not agreed that the statement shall be considered material, the policy is not affected, unless the misstatement is in a matter of fact material to the risk assumed by the insurer. May, Ins. § § 156, 170, 183; Ball v. Association, 64 N. H. 291, 9 Atl. 103; Campbell v. Insurance Co., 98 Mass. 381; White v. Society, 163 Mass. 108, 114, 39 N. E. 771, 27 L. R. A. 398; Pawson v. Watson, Cowp. 785, 787; De Hahn v. Hartley, 1 D. & E. 343. The plaintiff refused to accept the policy in the form in which it was first made out, and it was after-

ward changed to avoid his objection. From his subsequent acceptance of the policy, and his commencement of a suit upon it, it must be held, in the absence of fraud or imposition, that the plaintiff had notice of, understood, and agreed to, and is bound by, the terms, limitations, and conditions contained therein. Brown v. Insurance Co., 59 N. H. 298, 307, 47 Am. Rep. 205; Davis v. Insurance Co., 67 N. H. 335, 338, 39 Atl. 902.

The policy states that it issued in consideration of the application, which is made a part of the contract. The plaintiff having, by the acceptance of the policy, expressly assented that a portion of the contract was contained in the application, it is immaterial whether he acquainted himself with the contents of the application or not. He had the power to so agree, and, unless he was induced to make the agreement by fraud or imposition, is bound by his agreement and by the stipulations of the application. Monitor Mutual Ins. Co. v. Buffum, 115 Mass. 343, 345; Grace v. Adams, 100 Mass. 505, 97 Am. Dec. 117, 1 Am. Rep. 131. The application contained the clause following: "I hereby agree that all the following statements and answers, and all those I make to the company's medical examiner, in continuation of this application, are by me warranted to be true." Following this are certain questions and answers, the whole being subscribed by the insured, the plaintiff's brother. There is no claim that any statements made in the application are untrue. The opposite side of the sheet containing the application is headed "Medical Examiner's Report," and contains a large number of questions and answers, and a certificate signed by the insured that his answers have been correctly recorded by the medical examiner. The third question, which was answered in the negative, is: "Have you had any of the following diseases?" among which are enumerated "(e) chronic or persistent cough or hoarseness, or spitting or coughing of blood, asthma or shortness of breath, or any chest or lung disease," and "(n) gravel, bladder or kidney disease." There was evidence that at various times the insured had suffered from a cold and cough, and had been attended by a physician, to whom he complained at one time of shortness of breath, existing for some two months,

and that at another time he complained of urinary incontinence. Whether this evidence is sufficient to conclusively establish, as matter of law, the existence of any of the affections enumerated to such an extent as to constitute disease within the fair meaning of the contract, is not considered, because a portion of the answers included under the next two questions are false beyond dispute. The questions and answers are: "(4) Give name and address of physician last consulted. A. Dr. G. Morey, Manchester, N. H. (a) When was he consulted? A. March, 1899. (b) State nature of complaint. A. Cold. (c) Duration of complaint. A. Few days. (5) What are the full particulars of any other illness or injury you have had, giving date, duration, and remaining effects, if any? A. None." It was conceded that the last physician whom the insured consulted was Dr. Wheat. There was evidence that he was treated by Dr. Murray at some time in 1899, and the evidence was not conclusive that he was not treated by Dr. Morey; for though the doctor, who was called as a witness, stated that he had no recollection or record of having treated the insured, he declined to testify that he was not consulted by him. The plaintiff, however, testified that he was present at the medical examination, and that his brother told the examiner that he had been treated by Dr. Wheat and Dr. Murray. The application contains no warranty of the verity of the medical examiner's record, and unless estopped by the insured's certificate to its correctness, the conflict in the evidence would present a question of fact. Mutual Life Ins. Co. v. Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325. But the answer to the remainder of the question, as the case is understood, is conceded to have been untrue. The insured did not last consult a physician in March, 1899, for a cold of a few days' duration, but did consult Dr. Wheat January 6 and 20, April 2, 3, and 5, May 3 and 10, and June 1, 1900. During this time he was treated for a cough, which was severe at times, and for grip. Upon the undisputed evidence it could not be found that the last time the insured consulted a physician was in March, 1899, for a cold of a few days' duration, nor could it be found that the insured had had no illness other than a cold for a few days in March, 1899. As the jury could not find

the statements were true, there was a breach of the warranty of their truth, and the verdict was properly ordered for the defendants.

The plaintiff, however, claims that the statements were not warranties, but were representations which would not avoid the policy, unless fraudulently made or material to the risk. Whether the parties have agreed that a particular statement shall be a material part of the contract—a warranty instead of a representation—is a question of the interpretation of the contract, and in some cases the ascertainment of their intent in this respect may be a matter of difficuty; but where, as in this case, the untrue statements are expressly described as "warranties," there is little room for speculation as to what was meant. But since the question is the intent of the parties, it has been held that, even where by the letter of the contract the statements are made warranties, "that fact is not necessarily controlling, if they are not warranties within its fair meaning and spirit. With respect to questions that relate to matters which the insurer must know are not within the personal knowledge of the applicant, and with respect to those that call, not for definite statements of fact, but for statements of belief or opinion (as, for instance, whether the applicant has ever had a certain obscure disease), the letter of the contract is to be controlled by its spirit and purposes, and the answers will be held warranties only of the bona fide belief and opinion of the applicant." Dimick v. Insurance Co. (M. J. Err. & App.) 55 Atl. 291, 294, 62 L. R. A. 774. If this principle is sound, and could avail the plaintiff as to the inquiries relating to diseases had by the insured, it will not avail as to the inquiry as to the occasion of his last consulting a physician, which called for a mere matter of fact within the knowledge of the applicant. The company had a right to require, as a condition precedent to entering into the contract, that they should be truthfully informed as to how recently the applicant had need of medical advice. The statement was expressly made material to the contract, and is false beyond dispute. There is therefore no occasion to consider the question of insurable interest. Exception overruled.

Accord. Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366; Insurance Co. v. Leslie, 47 Ohio St. 409; Germanie F. Ins. Co. v. Deckard, 3 Ind. App. 361, 365, 367; Davis v. Aetna Mutual F. Ins. Co., 39 Atl. 902 (N. H.)

MUTUAL LIFE INS. CO. v. FORD.

FORD v. MUTUAL LIFE INS. CO.

Supreme Court of Texas. Nov. 2, 1910.
131 S. W. 406.

Breach of Warranty.

Action by Mary C. Ford against the Mutual Life Insurance Company. A judgment for plaintiff was modified. and affirmed by the Court of Civil Appeal (130 S. W. 769). Both parties apply for a writ of error. Denied.

Harris, Special Chief Justice. Mrs. Mary C. Ford sued the Mutual Life Insurance Company in the district court of Hays county upon a life insurance policy of the defendant company issued October 15, 1906, upon the life of the plaintiff's husband, Owen Ford, who died from a pistol wound at San Marcos, Tex., on the 7th day of December, 1906. Ford stated in his application for the insurance: "I am insured in other companies and associations as follows: $5,000 Equitable of New York and in no others." He warranted this statement to be true. The application was made on the regular printed form used by the company, and contained 20 printed questions and statements. The record does not disclose the questions, but the eighteenth and nineteenth paragraphs of said application signed by Owen Ford were as follows: "(18) I have been accepted for insurance under the following policies in this company: $1.000 Ten Pay. Income policy. (19) I am insured in other companies and associations as follows: $5,000 Equitable of New York and in no others." The application was expressly made a part of the contract of insurance. At the time of making the application, Ford had certificates

in fraternal assessment orders and local societies amounting to about $4,000. He also had an accident policy in the United States Casualty Company covering his death by accident in the sum of $5,000. The trial judge rendered judgment for Mrs. Ford for the face of the policy, $2,000, interest thereon from January 31, 1907, $240 as statutory damages, and $500 attorney's fees. He filed no findings of fact and conclusions of law. The Court of Civil Appeals in an exhaustive opinion affirmed the judgment of the District Court for the face of the policy and interest thereon, but set aside and rendered for the insurance company the items of statutory damages and attorney's fees. Each party has applied for a writ of error, and the applications will be here considered together.

The insurance company assigns as error that the Court of Civil Appeals erred in rendering judgment for Mrs. Ford because the proof is clear and uncontradicted that Owen Ford breached his warranty in not disclosing the full amount of insurance on his life; the insurance company insisting that, under the questions and answers contained in the application for insurance, the accident policy in the United States Casualty Company and the certificates in the fraternal assessment orders and local societies were contemplated by and were within the purview of the warranty made by the assured. We are therefore called upon to construe the language of the application according to the evident intent of the parties, to be derived from the words used, the subject-matter to which they relate, and the matters naturally or usually incident thereto, remembering that the language was selected by the insurance company to express the terms and conditions upon which it issued the policy. Therefore said language will be strictly construed against the insurance company and liberally in favor of the insured. If the words admit of two constructions, that one most favorable to the insured will be used so that forfeiture may be avoided if the language used is fairly susceptible of such an interpretation. Brown v. Palatine Ins. Co., 89 Tex. 595, 35 S. W. 1060. We concur in the view expressed by the Court of Civil Appeals as set forth at

length in their opinion. 130 S. W. 769. It is clear to us that the insurance company was asking Mr. Ford for material information as to the insurance in other companies and associations similar to the Mutual Life Insurance Company, and that Mr. Ford so understood the question and had a right to so understand it, and made a full disclosure as he understood the matter by answering "$5,000 Equitable of New York and no other like companies or like associations." Such portions of the application for insurance the same as though he had said "$5,000 Equitable of New York and no others." His answer is practically as are found in the record, while somewhat meager, sufficiently disclose that the evident intent of the parties to be derived from the words used and the subject-matter was on the one hand to secure, and, on the other hand, to reveal the truth as to the amount of insurance then on the life of Owen Ford in life insurance companies or associations of the character of the Mutual Life Insurance Company. The Equitable of New York is of like character as the defendant company. The words chosen by the company by no means exclude the reasonable conclusion that fraternal and accident certificates or policies—call them what you choose—were entirely outside the line of inquiry. Ford had a right to so conclude, and therefore his failure to volunteer information with reference to the fraternal orders and local societies and accident policy was in no sense a breach of his warranty.

The protection of the courts must be extended as freely to life insurance companies, which unquestionably render valuable service, as to citizens who consider themselves aggrieved by some act of such companies. However, we know that the Mutual Life Insurance Company and other similar life insurance companies are large concerns, employing excellent legal ability, preparing for themselves, within lawful limits, all the instruments constituting the contract beween themselves, the assured, and the beneficiary. There have been many cases in which the language used and selected to be used by insurance companies in applications for life insurance was so indefinite and so

inconclusive that recovery was permitted against them. It would therefore appear that, if the companies really desired, they could so frame their questions as to require an honest disclosure from those desiring life insurance as to every sum of money, by whatever name called, which would become due and payable upon and by reason of the death of the applicant, whether from old line companies, assessment orders, local societies, or any other source whatever. As long as insurance companies fail to propound the interrogatories requisite to ascertain this information from applicants, just that long the companies must be content with such a fair construction of the language as will prevent a forfeiture when possible.

The application of the Mutual Life Insurance Company for writ of error is refused.

Mrs. Ford asks for writ of error, and insists that the Court of Civil Appeals erred in denying her statutory damages and attorney's fees awarded by the district court. We concur with the Court of Civil Appeals in holding that under the facts in this case there was no such "demand" made upon the insurance company as is contemplated by article 3071, Rev. St. 1895. The statute is highly penal and must be strictly construed. Mrs. Ford forwarded proofs of death to the insurance company on the forms which the company furnished her, and shortly thereafter the company notified her that it would not pay the policy. Thereupon she brought this suit. It appears, therefore, that there was really no statutory "demand" made by Mrs. Ford upon the insurance company. Northwestern Life Assur. Co. v. Sturdivant, 24 Tex. Civ. App. 331, 59 S. W. 61; Security Co. v. Hallum, 32 Tex. Civ. App. 134, 73 S. W. 554; Penn. Mutual Life Ins. Co. v. Maner, 101 Tex. 562, 109 S. W. 1084.

The application of Mrs. Mary C. Ford for writ of error is also refused.

MODERN WOODMEN OF AMERICA v. WILSON.

Supreme Court of Nebraska. April 5, 1906. 76 Neb. 344.

Application—Construction of Questions. Misrepresentations.

Albert, C. This is an action on a beneficiary certificate, issued to the plaintiff's husband, by the defendant, a fraternal insurance association, in which the plaintiff is named as the beneficiary. The application, upon which the certificate was issued, was made by the assured on the 22d day of January, 1902, and is in writing on a blank furnished by the association. The blank application contained a large number of questions, which the assured was required to answer, a blank space for his answer following each question. Among the questions and answers, shown by the application, are the following:

"(14) Have you within the last seven years been treated by or consulted any physician or physicians in regard to personal ailment?" "Yes." "If so, give dates, ailments, and physician's or physicians' name and address." "1900. Dr. Alden. Grip."

"(15) Are you now of sound body, mind, and health, and free from disease or injury; of good moral character and exemplary habits?" "Yes."

"(21) Have you been an inmate of any infirmary, sanitarium, retreat, asylum, or hospital?" "No."

Then follows this statement: "I have verified each of the foregoing answers and statements from 1 to 28, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact, literal truth of each shall be a condition precedent to any binding contract issued upon the faith of the foregoing answers. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and Modern Woodmen of America, and are offered by me as a consideration for the contract applied for, and are hereby made a part of any

benefit certificate that may be issued on this application, and shall be deemed and taken as a part of such certificate; that this application may be referred to in said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract."

The application is attached to the certificate, and is expressly made a part of the contract, evidenced thereby; the certificate contains these express provisions: "That the Modern Woodmen of America is a fraternal beneficiary society, incorporated, organized, and doing business under the laws of the state of Illinois, and legally transacting such business in the state where said member resides; that the application for membership in this society made by the said member, a copy of which is hereto attached and made part hereof, together with the report of the medical examiner which is on file in the office of the head clerk, and is hereby referred to and made part of this contract, is true in all respects and that the literal truth of such application, and each and every part thereof, shall be held to be a strict warranty and to form the only basis of the liability of this society to such member, and to his beneficiary or beneficiaries, the same as if fully set forth in this benefit certificate; (2) that if said application shall not be literally true in each and every part thereof, then this benefit certificate shall, as to the said member, his beneficiary or beneficiaries, be absolutely null and void." The assured died on the 14th day of December, 1902, a little less than 11 months after the date of his application. Payment on the certificate was refused, hence this suit. The defense now relied upon is that the answers, hereinbefore set out, of the assured to questions in the application made by him, were made by him in regard to matters within his knowledge and material to the risk, and that such answers are incomplete and untrue.

It conclusively appears from the evidence that the assured suffered from some bodily ailment, from late in 1899 to midsummer of the following year. During that period he was treated successively by Dr. Alden, who is mentioned in the answer numbered 14, and four or five other

physicians. About 10 days of the latter part of this period the assured was treated at the home of one of the physicians in the city of Norfolk. Whatever may be the proper designation of the place in which he was treated, at that time, in the evidence it is sometimes designated as a sanitarium, and again as the home of the doctor. He left the doctor's home or sanitarium, the latter part of June, 1900, and, according to the doctor's evidence, he was cured of his ailment and practically sound and well. From that time until the date of his application, he was engaged in farming and other heavy work, and the evidence would sustain a finding that, to himself and others, he seemed to be in good health. There is considerable conflict in the evidence as to the nature and severity of the ailment for which the assured was treated during the period mentioned. Some of the physicians testified that it was pernicious anaemia, which is classified as an incurable disease; others that it was merely jaundice, and readily yielded to treatment. It is inferable from the evidence, that whatever may have been the technical name of the ailment, or its nature, it originated in an attack of la grippe. The evidence also leaves room for a difference of opinion, as to the nature of the ailment of which the assured died; one line of testimony tending to show that it was pernicious anaemia, another, that he died of an ailment resulting from injuries received after his application had been accepted. The jury returned a verdict for the plaintiff, and from a judgment rendered thereon the defendant appeals. The court submitted the case to the jury on the theory that incomplete or untrue answers to questions in the application would not defeat a recovery on the certificate unless such answers, or some of them, were intentionally incomplete or false, and made with intent to deceive. Whether that theory is sound, is the question now presented by the record.

The theory upon which the trial court submitted the cause is now vigorously assailed: the defendant contending that the honesty and good faith of the assured in making the answers in question are eliminated from the case, because

such answers are in regard to matters which were within the personal knowledge of the assured, and untrue. In support of this contention, the defendant invokes the rule announced in Royal Neighbors v. Wallace (Neb.) 102 N. W. 1020, which is as follows: "An untrue answer in an application for life insurance in regard to matters which are shown to be within the knowledge of the applicant and are material to the risk will avoid the policy." In that case a distinction was shown between untrue answers in regard to matters of opinion, or judgment, and those in regard to matters shown to have been within the knowledge of the applicant, and the court reached the conclusion that the former, if made in good faith and without intention to deceive, would not avoid the policy, but that the latter, if material to the risk, would defeat a recovery. But while the doctrine announced in that case would necessarily eliminate the question of the good faith and honesty of the assured, as to untrue answers in regard to matters within his knowledge, it would not eliminate the question of his honesty and good faith as to the construction to be placed upon the questions propounded in the application. Every practitioner knows that it frequently happens, that an apparently false answer is given to a question, simply because the witness gathers a different meaning from the question than that his interrogator intended to convey. Hence, ordinarily, the first question that arises when the truthfulness of an answer is challenged is whether the party giving the answer understood the question. The assured is dead and is not here to explain why he answered as he did. The questions are not of his framing, but of the defendant, thought out and elaborated in the quiet of an office, where every word was examined and carefully weighed. The assured was a farmer, and many of the words and the combinations in which they were used, undoubtedly were new to him. Under such circumstances, it is highly probable that the assured failed to grasp the true import of some of the questions. As the questions are made a part of the contract, and were prepared by the defendant, they should be construed most strongly against it. Connecticut Fire Ins. Co. v. Jeary, 60 Neb. 338, 83 N. W. 78, 51 L. R. A. 698. And where any of such questions are

so framed, or placed, that the assured may have honestly mistaken their true import, and gave answers thereto which are in fact untrue; but true as he may have reasonably understood the questions, it is for the jury to say, we think, in the light of the entire transaction, whether, in making his answers, he acted honestly and in good faith, and without intention to misrepresent or conceal any material fact.

Applying the foregoing rule to question numbered 14, and the answer thereto, which we repeat: "Have you within the last seven years been treated by or consulted any physician, or physicians, in regard to personal ailment?" "Yes." "If so, give dates, ailment, and physician's or physicians' name and address." "1900, Dr. Alden. Grip." In the first place it is somewhat involved, consisting in fact of five questions. It is followed by a space for an answer, which is barely sufficient to give the name and address of one physician, ailment, and date. We have already shown that the assured was ill from the latter part of 1899, until near the middle of the following summer, and that the illness apparently began with an attack of la grippe. His illness during that period was practically continuous, and it is not surprising that he considered la grippe as the ailment from which he suffered during the whole period. However, in another part of the application, when asked whether he ever had jaundice, the assured, referring to the same illness, answered, "Yes." But the evidence shows that the assured, as well as some of his physicians, considered that during the whole period he was suffering from some of the consequences of the attack of la grippe. Dr. Alden was one of the physicians who attended him during that period, and was also the medical examiner of the local lodge who took the application. In his report on the examination of the assured for membership, he made a somewhat extended statement in regard to the assured's answer, that he had had jaundice. Taking into account the nature of the question, which might leave some doubt in the ordinary mind as to whether it called for the name of each physician who had attended the assured during the same spell of sickness, the limited space left for the answer, which is of itself a hint that the answer be brief and that at the date of the application

the assured was apparently in sound health, it is not an unreasonable inference that in giving a general designation of the ailment with which he had been afflicted during that period, the date, and name of an attending physician who could furnish information with respect to it, the assured honestly supposed that he had given all the information sought to be elicited, and had made a full and complete answer to the question. Besides, the defendant itself would seem to have inclined to that view, because while a subsequent answer showed that the assured had had jaundice, and the medical examiner forwarded a statement with respect to that answer with the application, the defendant with the knowledge of the fact before it, that the answer to question 14 was not full and complete, made no objection on that ground, but accepted the assured and issued the certificate. In view of all of these facts, and the circumstances surrounding the transaction, we think it was for the jury to say whether the assured's answer to question 14 was made honestly and in good faith, and without any intention to deceive the defendant. Besides, courts have not been disposed to hold the assured to a high degree of strictness with respect to questions of this character. It is well settled that in answer to such questions the assured is not required to give the name of every physician he has consulted or every ailment for which he has been treated, but may restrict his answer to serious ailments. Blumenthal v. Berkshire Life Ins. Co. (Mich.) 96 N. W. 17, and cases cited.

The next question "are you now of sound body, mind, and health, and free from disease and injury, of good moral character and exemplary habits?" The space left for this answer is barely sufficient for the word "Yes." This clearly shows that the company required a categorical answer. The question itself shows that it called for the opinion of the applicant. The applicant at that time, so far as is disclosed by the evidence, may have been or at least may reasonably have supposed himself to be, in good health and free from disease. The space left for his answer precludes the idea that it was intended that he should give a history of his past ailments. There is nothing in the record that would warrant the court in holding that the answer was not given in good faith, and

according to the applicant's condition as he understood it at that time.

We come now to the last question: "(2) Have you been an inmate of any infirmary, sanitarium, retreat, asylum, or hospital?" The space left for the answer to that question also indicates that the association required a categorical answer, and the answer is "No." We have seen that the assured, in 1900, was treated at the home, or sanitarium of a certain physician, for a period of about 10 days. We have also seen that this place is sometimes referred to as the home of such physician, and sometimes as his sanitarium. This physician testified that he had treated the assured in June, 1900, in the city of Norfolk, and, when asked at what particular place in that city, answered, "At my sanitarium; at my home." When asked if he maintained a hospital or sanitarium in that city, he answered, "I did in the year 1901," the year following his treatment of the assured. Taking this evidence all together, we infer that at the time the assured was treated by this physician in Norfolk, the place where he was treated was not commonly known as a hospital or sanitarium, but merely as the doctor's private home, where, in special cases, he received patients for treatment. And it is highly probable that the assured knew the place by the name by which it was commonly known, and that he would have been surprised had he been told that by entering the doctor's private home for treatment, he became an inmate of "an infirmary, sanitarium, retreat, asylum or hospital." The question immediately preceding the one under consideration, "Have you ever taken any treatment for tobacco, morphine, cocaine, or opium habit?" throws some light upon the construction which the assured placed upon the inquiry as to whether he had ever been an inmate of an infirmary, etc. It carries with it a suggestion of the popular conception of the institutions where such habits are commonly treated which is entirely different from that of the private home of a physician where patients are occasionally received for treatment. We consider the evidence ample to warrant a finding, that the assured's answer to the question under consideration was given in good faith, and truthfully, as he understood the question. It is true, the jury found spe-

cially that the place was a sanitarium, but that is a mere matter of a difference in definitions, and does not necessarily contradict the general finding that the assured's answers were given honestly, in good faith and without any intention to deceive.

Complaint is made of the refusal of the court to give certain instructions tendered by the defendant, but as such instructions each and all conflict with the theory upon which the court submitted the case, and which, in our judgment, was the proper theory upon which to submit it, they require no extended notice at this time.

It is recommended that the judgment of the district court be affirmed.

Per curiam. For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed.

BICCARD and Others, Trustees of the Commercial Marine and Fire Assurance Company, Appellants, v. SHEPHERD and others, Trustees of the Namaqua Mining Company, Respondents.

Privy Council, 1861. 14 Mo. P. C. 471.

Warranty, Ship Sea Worthy.

Judgment was delivered by The Right Hon. Lord Wensleydale. The respondents in this case sought to recover a total loss upon a policy for £4,000 subscribed on behalf of the defendants, an insurance company at the Cape of Good Hope, on Copper ore, on a ship, the "Admiral Collingwood," at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea, to commence upon the loading on board the ship at and from the above ports.

The respondents, under this policy, might have shipped what proportion of the copper ore they pleased at one anchorage or the other, probably the whole at one. They put on board at Hondeklip 154 tons. The vessel sailed to Port Nolloth with

that quantity on board; arrived at Port Nolloth, there took on board the further quantity of 200 tons, and sailed for Swansea. In the way thither she sank, and the copper ore was lost.

On the trial before the judges of the Supreme Court of the colony of the Cape of Good Hope, who are judges both of fact and law, witnesses were examined on both sides, and the judges did not all take the same view of the evidence. On pursuing that evidence, the probability, their Lordships think, is that the ship was a seaworthy at Hondeklip, and when she arrived at Port Nolloth; but that she became unseaworthy when she was loaded with the additional copper at that place, and sailed with it for Swansea, the cargo being then too heavy for her. We think we may assume this to be the true state of the facts; and then follows the question of novelty and some nicety. Are the assured entitled to recover for the loss of the whole cargo; or, if not, are they entitled to recover for the loss of the 154 tons shipped at Hondeklip?

Their Lordships have had great difficulty in coming to a conclusion upon it, but after much consideration agree that the plaintiffs are entitled to recover for the latter, but for the latter only.

Some propositions in the doctrine of the implied warranty of seaworthiness, which forms a part of every contract of marine insurance on voyages (for to time policies it does not apply), are perfectly settled. * * *

There is a warranty of a similar nature in an insurance upon goods with respect to the ship upon which they are loaded. Whether this warranty is to be qualified in the manner pointed out by Mr. Lush in his very able argument, it is not necessary to determine. He contended that when a shipment takes place in an intermediate open anchorage (not a port where there are means of repair), and in the course of a voyage from another terminus, all that the shipowner impliedly warrants to the shipper, and all that the shipper impliedly warrants to the assurer, as to the state of the ship, is that the ship was seaworthy at the commencement of the original voyage to the place of shipment. Whether this, which is a highly reasonable proposition, be correct or not, we need not inquire, be-

cause, upon the evidence, there appears no doubt that the ship was seaworthy at Hondeklip, where the first parcel of ore was put on board, as at the Cape.

What, then, is the commencement of the sea voyage in this case, which is to fix the time when the warranty is to attach, and when the vessel is to be fit in all respects for sea navigation? The appellants contend that the words "at and from the anchorages off Hondeklip Bay and Port Nolloth to Swansea," are equivalent to "at and from the coast of Africa to Swansea," and that the sea voyage began at Port Nolloth; and it was likened to an insurance at and from the island of Jamaica to England, in which, it was said, the sea voyage would begin with the departure from the island; and the case of Bond v. Nutt, 2 Cowp. 601, was referred to as proof of that proposition.

Their Lordships think that such a construction cannot be put on these words, and the case of Bond v. Nutt is only an authority to show that the departure from the island was within the meaning of a warranty to sail on or before a certain day, and not the commencement of a sea voyage within the meaning of a warranty of seaworthiness. The first voyage from port to port in the island, through the open sea, would answer that description.

The true construction of the words in question undoubtedly is "at and from Hondeklip to Swansea, or at and from Hondeklip to Port Nolloth, and at and from that port to Swansea," as the power to ship at one or more of these places might be exercised (whether the places are to be taken in their order is immaterial to this inquiry). It seems to their Lordships, therefore, as there were undoubtedly two risks insured,—one on the parcel of goods shipped at Hondeklip, another on those shipped at Port Nolloth,—that the sea voyage may be considered as beginning at different times; with respect to the first parcel at Hondeklip, with respect to the second, at Port Nolloth. As to the first part, the implied warranty of seaworthiness, being that the ship was in a proper state of repair and equipment, and sufficient for the carriage of the cargo then put on board to Swansea, was certainly complied with. It could not be that there was an implied warranty

that the ship was in a fit state to carry all that might be put on board at Port Nolloth, so that if the ship should be lost before it arrived at Port Nolloth, with the goods then shipped on board, nothing would be recovered on the policy; for, before the second shipment the vessel might have been put into a state fully sufficient to carry the whole cargo. The warranty being complied with at Hondeklip as to the 154 tons there put on board, the subsequent improper conduct of the master and crew in rendering the vessel unseaworthy at Port Nolloth cannot affect the right to recover pro tanto. The assured or their agents, though concerned in the shipment, probably knew nothing of the capacity of the ship to carry the goods they put on board; and the fault was that of the master and crew, which would not avoid the policy, nor would it if the shipping agents were parties, as the ship was immediately lost by the perils insured against. Redman v. Wilson, 14 M. & W. 476.

Their Lordships, therefore, have come to the conclusion that for the first shipment the assured are entitled to recover.

But, with respect to the second parcel, that shipped at Port Nolloth, the implied warranty, that the ship should be there fit to carry the additional as well as the original cargo, was certainly, upon their Lordships' view of the evidence, not complied with, and therefore the respondents cannot recover.

The pleadings do not appear to have been framed very accurately to raise this defense; but this objection has not been pressed upon their Lordships.

Therefore their Lordships, after much consideration, and not without some doubt, have determined to advise her Majesty to affirm the judgment as to the value of the 154 tons shipped at Hondeklip and reverse it as to the residue.

ELI CLARK, WILLIAM GREEN, and HUGH McGILL, Plaintiffs in Error, v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE MANUFACTURERS' INSURANCE COMPANY, Defendants.

Supreme Court of the United States. 1850. 8 How. 235. 12 Law Ed. 1061.

Warranties by Former Owner, Adopted by Reference.

Mr. Justice Woodbury delivered the opinion of the court:

The original action in this case was assumpsit by the plaintiffs in error on a policy of insurance, made August 13, 1845.

From the detailed statement of the facts, it will be seen that the loss occurred on the 13th of March, 1846, and was to be paid to the Ogdensburg Bank, which held the title to the property insured, but was under a contract in a certain event to convey it to the plaintiffs, they having already paid for it in part.

The original insurance was made in 1834, by Jonathan Stearns, who had mortgaged to the bank the factory insured, and who continued most of the time till the loss to conduct its operations under insurances renewed yearly, often in different names—stipulating that any loss should be paid to the bank.

In April, 1834, when application was first made for insurance, the defendants, doing business in Boston (Mass.), put numerous written interrogatories to Stearns, who lived in Malone (New York), where the factory was situated, and to one of them he replied, that no lamps were "Used in the picking room." These interrogatories, and the answers to them, were not annexed to the policy, but were put on file in the office; and the policy purported to have been "Made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," etc., etc.

No new representations appear to have been made at the different renewals, but only a general reference to representations, like that just named; and in three or four instances,

when the policy was in a new name, a specific statement was inserted that the insurance was entered into "agreeably to the representations heretofore made by Jonathan Stearns."

Referring to the record and preliminary statement of this case for other details, the plaintiff objected first to the competency of parol evidence, which was offered to prove that the representations signed by Stearns, and on file with his application, were those made by him, and to the instruction of the court, that if they were adopted by the plaintiffs, the present policy as well as the original one must be considered as founded on them and void, if they were not true.

It will be proper, then, to consider first whether this parol evidence was competent for the purpose for which it was offered.

Without meaning to impugn the great elementary principle, that written instruments are not to be varied or contradicted by parol, it suffices to say here that this testimony was not admitted to vary or contradict any portion of what had been written. (See Phillips v. Preston, 5 Howard, 291.)

It merely went to identify what the writing in the policy referred to, as a part or parcel of the contract, like a reference in one deed or contract to another deed or contract. (13 Wendell, 92; Jennings v. Chenango Ins. Co., 2 Denio, 82; Phillips on Ins., 47; 16 Pick., 502; 1 D. & E., 343; 2 Brod. & Bingh., 553; 4 Russ., 540; 20 Pick., 121; 1 Paige, 291; 8 Metcalf, 114, 350; 4 Howard, 353; 3 Barn. & Ald., 299; Wigram on Ext. Ev., 54, 55; 1 H. Bl., 254; 2 H. Bl., 577; 6 D. & E., 710; 1 Duer on Ins., 74.)

It added to what was written nothing, it subtracted nothing, it changed nothing, and we think its admission was legal.

In the next place, the instruction that the plaintiffs were bound by those representations, if adopting them subsequently at the time of making their insurance, accorded with both the law and equity of the transaction.

If they adopted them and induced the defendants to act on them, it would operate fraudulently to let them be disavowed after a loss. So if the plaintiffs ratified them, in their subsequent application, if no other representations were made or relied on except these, if their attention was called to

these; if the bank was a party in interest through all these insurances, without repudiating these representations, and if these were the only set of representations used in all of them, it surely must comport with justice, as well as law, to have them govern.

The cases of like subsequent adoptions and ratifications of what had been done before by others are very numerous. Among them see those collected in Story on Agency, secs. 252, 253. Even "slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification." (Ward v. Evans, 2 d. Raym., 928; 3 Wash. C. C., 151; 13 Wend., 114; 3 Chitty Com. L., 197.)

This view of the case, standing alone, would entitle the defendants to be discharged, for the picking room, contrary to these representations, had a lamp, and indeed lamps, in it; and their use was proved to be the cause of the fire which destroyed the factory.

We should, therefore, affirm the judgment below without further inquiry, did not the bill of exceptions disclose another ruling, which, as the record now stands, requires consideration. When the judgment below is, as here, well sustained by the opinion entertained on a decisive point, it is usually of no consequence whether another point was correctly ruled or not. But as the bill of exceptions in this case was drawn up by the plaintiffs, it states that the jury were instructed to find a verdict for the defendants on the last ground, if on the facts the first one failed; and hence, looking to the record, the last ground may have been passed on by the jury, and have influenced their verdict. To be sure, the report of this case below (in 2 Wood. & M., 472) shows that a verdict was taken by agreement of parties, or only pro forma, in order to bring the questions of law to the Supreme Court; and therefore, that no jury could in truth in this case have been thus influenced or misled. Yet this fact not appearing on the record brought here, the case, till revised and corrected below in this particular, must be considered as if the jury had actually examined both grounds, and had really decided upon them. But even on that hypothesis, if the second point was properly ruled, no occasion would exist for sending the case

back for correction in the statement as to the verdict, in connection with the first point.

Whether it was properly ruled or not involves a question of much novelty, being in one aspect of it a case, perhaps, of the first impression; and without any precedent to govern us, and is of so much importance in insurances as to deserve great caution in settling it. From the report of the case below, before referred to, the Circuit Court, though alluding to the last point, do not appear to have gone into any critical discussion and opinion on it.

But the bill of exceptions being so drawn up as to exhibit a positive instruction given on it by that court to the jury, it is necessary for us to examine with care whether an instruction like that presented here could legally be given.

First, then, what is the substance of that supposed instruction?

It is, that if no representations were made or adopted by the plaintiffs, they would not be entitled to recover, if lamps were in truth used in the picking room, which were conceded to be material to the risk, and this use was known to the plaintiffs and not to the defendants, and this use was meant to be continued, and was continued, and caused the present loss. In the next place, what must be considered the law in relation to this subject? Little doubt exists, that, when representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking room, where one or more was in truth used, makes the policy void, not only for misrepresentations, but misdescription and concealment. (1 Marshall on Ins., 481; Ellis on Fire and Life Ins., 58; Dobsen v. Sotheby, 1 Moody & Malk., 90; 6 Cowen, 673; 4 Mass., 337.)

A false representation avoids the policy, because it either misleads or defrauds. (Livingston et al. v. Mar. Ins. Co., 7 Cranch, 332.)

In such a state of things, also, the insured—knowing that he is asked for representations to enable the underwriter to decide properly whether he will insure at all, and if so, at what premium—must suppress nothing material to the risk, or the underwriter will not stand on equal grounds with himself,

and will be forced to act in the dark more than himself, and probably to misjudge. (1 Marshall on Ins., 473, 474, note; Lynch v. Dunsford, 14 East, 494; Maryland Ins. Co. v. Ruden's Ad., 6 Cranch, 338, and Livingston v. Mar. Ins. Co., Ibid., 279; Columbian Ins. Co. v. Lawrence, 10 Peters, 516; McLanahan v. Universal Ins. Co., 1 Peters, 185; 2 Peters, 59; 2 Duer, 388, 379, 411; 2 Caines, 57; 1 Wash. C. C., 162.)

Concealment thus would operate in some cases as a fraud, and in all will make risk very different from what the insurer knew and agreed to. (3 Burr., 1905; Ellis on Fire and Life Ins., 38.)

But the hypothetical position presented by this record is that the law would be the same, provided no representations whatever were made, and in this form it does not in the state of facts exhibited in the record, meet with the sanction of this court. The chief controversy appears to have been concerning the first point; and when this last question was made a part of the case by agreement of counsel, it was not known whether this court would consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. (Columbian Ins. Co. v. Lawrence, 2 Peters, 49; S. C., 10 Peters, 515) but they are not usually named or incorporated in the policy, except on the continent of Europe. (3 Kent, 237; 9 Barn. & Cress., 693.)

It is fair to presume, that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." (1 Marsh. on Ins., 450.)

But the relation of the parties seems entirely changed, if the insurer makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this; it must be presumed that the insurer has in person or by agent

in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the insured. (8 Peters, 582.)

Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade—its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. (Hazard's Adm., v. New England Mar. Ins. Co., 8 Peters, 557; 2 Duer on Ins., 379, 478; 3 Kent's Com., 285, 286; Green v. Merchants' Ins. Co., 10 Pick., 402; 4 Mason, C. C., 439; Buck et al. v. Chesapeake Ins. Co., 1 Peters, 160.) Nor on any special usage proved, as in Long v. Duff. (2 Bos. & Pull., 210), that it was like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must in point of law be deemed to do it at his peril.

It has been justly remarked, in a case somewhat like this in principle, "With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself," etc. (1 Marshall on Ins., 481, 482; Carter v. Boehm, 3 Burr., 1905.)

In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurance; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. (1 Harr. & Gill. 295; Burrit v. Saratoga M. F. Ins. Co., 5 Hill, 192.)

It is true, that what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked

or obtained, to take the risk, on the hypothesis that nothing unusual exists enhancing the risk; and hence, as in this case, if lamps are used in the picking room, which do enhance it, he must show that their use in the manner practiced was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where suppressio veri would be as improper and injurious as suggestio falsi. (Livingston v. Mar. Ins. Co., 6 Cranch, 281.)

So if any extrinsic peril existed, outside and near a building insured, and which increased the risk, the insured should communicate that, though not requested. (Bufe v. Turner, 6 Taunt., 338; Walden v. La. Ins. Co., 12 La., 134.) But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case then are, that the defendants are entitled to be discharged on the first ground upon the merits; because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted; and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and therefore, by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this conclusion, standing alone, because the second point is connected with it in the form before explained. Again, the defendants would be entitled to be discharged under the second point on the ground which accords with the truth here, that representations were really made on this subject; but not, if none whatever were made according to what is hypothetically suggested in the record. The judgment below must therefore be reversed, for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the facts proved; and the case

must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.

Order.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Massachusetts, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby reversed, with costs, for the purposes of correcting what is defective in the manner of stating how the verdict was taken, and how the last question stood by itself on the facts proved, and that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein in conformity to the opinion of this court.

GERMIER v. SPRINGFIELD FIRE & MARINE INS. CO.

Supreme Court of Louisiana. Jan. 1903. 109 La. Ann. 341.

Warranty Ownership Burden of Proof.

Monroe, J. Plaintiff sues to recover for a loss said to have been sustained during the life and within the terms of a policy of fire insurance issued to him by the defendant. The answer is a general denial, coupled with an admission as to the issuance of the policy, and an averment that the same is void by reason of misrepresentation on the part of the plaintiff as to the ownership of the property. The facts, as disclosed by the evidence in the record, are as follows: In 1898 the plaintiff, who had recently arrived from France, purchased a few arpents of land near New Iberia, upon which were subsequently erected a dwelling house and a building which seems to be called a "barn," and also an "office." Upon February 11, 1899, he appears to have sold this prop-

erty to P. LeBrun for $500. He, however, remained in possession, though in what capacity does not appear. Upon October 22, 1900, he applied to defendant's agent for insurance in his own name upon the buildings mentioned, upon the furniture in the dwelling, upon his vehicles, and his hay, etc., in his barn and sheds. In his application he answers questions propounded by saying that he is the owner of the land, and that the property is mortgaged for $450; and the application concludes with the stipulation that the "foregoing (referring to the questions and answers) is a just, full, and true exposition of all the facts and circumstances in regard to the conditions, value, and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk; and said answers are considered the basis on which insurance is to be effected, and the same is incorporated in, and considered as forming part and parcel of, the policy."

Upon this application the policy issued, assuring the applicant to October 22, 1901, to the extent of (1) $500 on the dwelling; (2) $200 on the barn and sheds; (3) $1,800 on the furniture, etc., contained in the dwelling; (4) $50 on vehicles, and (5) $50 on hay, etc., in the barn and sheds. The policy contains the following, among other, provisions:

"Special reference being had to assured's application, on which this insurance is based, which is hereby made a warranty by the assured and part of this policy. * * *

"This entire policy shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof or if the interest of the insured in the property be not truly stated herein. * * *

"Or if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple."

On May 13, 1901, there was attached to the policy by the agent who issued it a typewritten slip reading as follows:

"Indorsement. Mr. Elie Germier. New Iberia, La., May 13th, 1901. Any loss that may be ascertained and proven to

be due the assured under the first and second items of this policy shall be payable to Pierre Le Brun, of New Iberia, La., as his interest may appear at the time of loss, and remainder, if any, to assured. Attached to and forming part of the policy No. 1,062, Springfield F. & M. Ins. Co., of Springfield, Mass. [Signed] Geo. M. Robertson, Agent."

The dwelling house and contents, save a few movables, were destroyed by fire on the night of June 12-13, 1901, and the plaintiff immediately gave notice of that fact, and furnished a list of the movables destroyed, with a valuation of the same.

The defendant's special agent, who was charged with the adjustment of the loss, about that time, however, discovered the condition of the title of the real estate, and wrote to the assured, in part, as follows:

"Upon examination of the loss, I find that at the time of the issuance of the policy you represented that you owned the land on which the building stood, and that this was not the case. * * * Under these facts, and it appearing that prior to the issuance of the policy you had conveyed the land and house to Mr. Pierre Le Brun, and that you did not own the house, nor the land upon which it stood, at the time of the issuance of the policy, there is no liability. For these and other reasons, not necessary now to indicate, we respectfully decline to pay the policy."

And thereupon the plaintiff brought this suit, declaring upon the policy as issued, claiming for the loss of the dwelling as well as of the furniture, and yet making no averments to negative the idea that the record does not speak the truth in saying that the land and buildings belonged to Le Brun. Upon the trial his counsel attempted to introduce his oral testimony for the apparent purpose of showing that there was some other and further understanding as to the title than appears upon the face of the papers, but the testimony was objected to and excluded. There was judgment for plaintiff in the sum of $1,800, as the loss, covered by the policy, on the furniture, but rejecting his demand in other respects, and the defendant has appealed.

Opinion.

In the absence of any express declaration on the subject, whether a particular representation or promise in a policy of insurance amounts to a warranty depends, it may be said, upon its materiality, as determined by the court in which the question is litigated. When, however, the conclusion is reached that such representation or promise is intended as a warranty, the question of its materiality is eliminated, and the only concern of the court, in the absence of a statutory enactment to the contrary, is to determine whether the representation is true or false, or whether there has been a compliance or noncompliance with the promise. The contracting parties are always at liberty to decide for themselves which of the representations and promises are intended as warranties, and which are not; and those which by the terms of their contract they have declared to be warranties, whether affirmative or promissory, must be accorded that character.

Whatever, therefor, may be said, in the absence from the contract of any stipulation on the subject, of the materiality and character of a representation as to the ownership of the property insured, if by the terms of the contract such representation is declared to be a warranty, it must be given that effect. In the instant case both the materiality of the representation as to ownership and its character as a warranty are specifically declared in the contract, which further provides that it ("the entire policy") shall be void if there be either concealment or misrepresentation on that subject. The proposition that, though the policy be void as to the house, it may be enforced as to the contents, is untenable, for such is not the contract between the parties; and the insurer, underwriting both the house and the contents by one contract, was entitled to know the interest of the insured in the whole. Adema v. Insurance Co., 36 La. Ann. 660; Dumas v. Insurance Co. (Ct. App. D. C.) 40 L. R. A. 358. It is said by counsel for defendant, "But even if the misrepresentation in this case would amount to a warranty, and its effect was to avoid the policy in toto, there has been a waiver by the company."

This refers to the fact that a short time before the fire the agent of the company attached to the policy the slip mak-

ing the loss, if any, upon the building, payable to Le Brun. That change was, however, entirely consistent with the idea that Le Brun was the mortgagee, whereas, from all the evidence that we find in the record, he was the owner, of the real estate, though we do not find, as the counsel seem to think was the case, that defendant's agent was aware of that fact; neither he, nor the party (Mr. Indest) at whose instance he transferred the insurance to Le Brun, having been examined; Le Brun, who was examined, having been asked no questions upon that subject; and the plaintiff himself testifying merely that Indest took the policy to the agent, and brought it back with the slip attached.

It has been held that an equitable title is sufficient to support a warranty that the interest of the insured is the entire ownership of the property, and it may be that the transaction which appears to be a sale between the plaintiff and Le Brun was intended to operate as a mortgage to secure a debt due by the former to the latter. If this be true, we are not prepared to say that the plaintiff may not recover, though we do not determine that question at this time.

Upon the other hand, as the case was presented, we are not disposed to criticise the ruling of our Brother of the district court in excluding testimony on that subject, especially as the counsel for the plaintiff seems to concede that it was correct. Beyond this, we are of the opinion that the testimony of the plaintiff, giving only the original cost price of movables, a large proportion of which had been in use for several years, falls somewhat short of establishing their value for the purposes of this case.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and that there now be judgment dismissing this suit as in case of nonsuit; the plaintiff to pay all costs.

THE FIRST NATIONAL BANK OF KANSAS CITY, Plff. in Err., v. THE HARTORD FIRE INSURANCE CO.

Supreme Court of the United States. 1877. 95 U. S. 673, 24 Law. Ed. 673.

Over Valuation of Property.

Mr. Justice Harlan delivered the opinion of the Court:

This is an action on a policy of insurance issued by the Hartford Fire Insurance Company, on a certain mill property, building and machinery. The parties, by written stipulation, waived a jury; and, upon a special finding of facts, the Circuit Court gave judgment for the company. The court can only inquire whether the facts support the judgment.

It appears from the special finding, that, by the terms of the application, the assured was required to state separately "The estimated value of personal property and of each building to be insured, and the sum to be insured on each; the value of the property being estimated by the applicant." The applicant was also directed to answer certain questions, and sign the same "as a description of the premises on which the insurance will be predicated." Among the questions to be answered were: "What is the cash value of the buildings, aside from hand and water power? What is the cash value of the machinery?" The answer was "$15,000, machinery."

The application concludes with these words: "And the said applicant hereby covenants and agrees to and with said Company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured so far as the same are known to the applicant, and are material to the risk."

The policy refers to the application in these words:

"Special reference being had to assured's application and survey, No. 1462, on file, which is his warranty, and a part hereof."

The policy further recites:

"If an application, survey, plan or description of the prop-

erty herein insured is referred to in this policy, such application, survey, plan or description shall be considered a part of this policy, and a warranty by the assured; and if the assured in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, then, and in any such case, this policy shall be void. Any fraud or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy."

The policy also declares that it is made and accepted upon the above, among other express conditions.

It is found by the court that when the policy was issued, as well as at the date of the destruction of the property by fire, the cash value of the building, aside from hand and water power, was $8,000, and no more; and the cash value of the machinery, at the same dates, was $12,000, and no more.

The court also found that "The answers made by the assured to the questions contained in the application were made by him in good faith without any intention on his part to commit any fraud on the defendant."

It is further declared in the special finding, that, "Under the provisions of the policy and application, made part thereof, the court finds, as a conclusion of law, that the answers of the assured as to the value of the property insured defeat the right to recover on the policy."

On behalf of the Company, it is contended that, under any proper construction of the contract, the assured warranted, absolutely and without limitation, the truth of the several statements in the application, including the statement as to the value of the property. If this view be sound, the judgment of the Circuit Court must be affirmed; otherwise, it must be reversed.

After a careful examination of the authorities, and upon mature consideration of the suggestions of counsel, our conclusion is that the plaintiff in error, who is the beneficiary of the policy, is entitled to a judgment, notwithstanding the overvaluation of the property by the assured.

The entire application having been made, by express words, a part of the policy, it is entitled to the same consideration

as if it had been inserted at large in that instrument. The policy and application together, therefore, constitute the written agreement of insurance; and, in ascertaining the intention of the parties, full effect must be given to the conditions, clauses and stipulations contained in both instruments.

Looking first into the application, we find no language which, by fair construction, was notice to the assured that, in answering questions, he was assuming, or was expected to assume, the strict obligations which the law attaches to a warranty. There is no intimations anywhere in that instrument that the exact truth of the answers was a condition precedent, either to the consideration of the application or to the issuing of a policy. On the contrary, the application contains the covenant of the assured that he had in that instrument made a just, full and true exposition of all material facts and circumstances in regard to the condition, situation, value and risk of the property, so far as known to him. The taking of that covenant, at the threshold of the negotiations, was, in effect, an assurance that a frank statement of all such material facts as were within the knowledge of the applicant would meet the requirements of the Company. It was a covenant of good faith on the part of the assured—nothing more; and, so far as it related to the value of the property, was not broken, unless the estimates by the assured were intentionally excessive. If the case turned wholly upon the construction to be given to the application, it is quite clear that the over-valuation of the property would not defeat a recovery upon the written agreement, since the assured, by the special finding, is acquitted of any purpose to defraud the Company. That is equivalent to saying that the assured did not withhold any material fact within his knowledge, concerning the condition, situation, value or risk of the property.

But the difficulty in the case arises from the peculiar wording of the policy, considering the application as a part thereof. While the assured in one part of the written agreement is made to stipulate for a warranty, and in another the policy is declared to be void if the assured "makes any erroneous representation, or omits to make known any fact material to the

risk," in still another part of the same agreement—the application—he covenants that, as to all material facts within his knowledge, respecting the conditions, situation, value and risk of the property, he has made a full, just and true exposition. If the purpose of the Company was to secure a warranty of the correctness of each statement in the application, and if the court should adopt that construction of the contract, there could be no recovery on the policy, if any one of these statements were proven to be untrue; and this, although such statement may have been wholly immaterial to the risk, and was made without any intent to mislead or defraud. Such a construction, according to established doctrine, might defeat the recovery, even if the overvaluation had been so slight as not to have influenced the Company in accepting the risk. But if such was the purpose of the Company, why did it not stop with the express declaration of a warranty? Why did it go further, and incorporate into the policy a provision for its annulment in the event the assured should make an "erroneous representation, or omit to make known any fact material to the risk"?—language inconsistent with the law of warranty. Still further, why did the Company make the application a part of the policy, and thereby import into the contract the covenant of the assured, not that he had stated every fact material to the risk, or that his statements were literally true, but only that he had made a just, true, and full exposition of all material facts, so far as known to him.

It is the duty of the court to reconcile these clauses of the written agreement, if it be possible to do so consistently with the intention of the parties, to be collected from the terms used.

It will be observed, from an examination of the questions propounded to the assured, that, among other things, he was asked whether the building was of stone, brick, or wood; how the premises were warmed; what materials were used for lighting them; whether a watchman was kept during the night; what amount of insurance was already on the property; whether it was mortgaged, etc. These and similar questions refer to the matters of which the assured had actual knowledge, or about which he might, with propriety, be required

to speak with perfect accuracy. They are matters capable of precise ascertainment, and in no sense depending upon estimate, opinion or mere probability. But his situation and duty were wholly different when required to state the cash value of his property. He was required to give its "estimated value." His answers concerning such value were, in one sense, and, perhaps, in every just sense, only the expression of an opinion. The ordinary test of the value of property is the price it will command in the market if offered for sale. But that test cannot, in the very nature of the case, be applied at the time application is made for insurance. Men may honestly differ about the value of property, or as to what it will bring in the market; and such differences are often very marked among those whose special business it is to buy and sell property of all kinds. The assured could do no more than estimate such value; and that, it seems, was all that he was required to do in this case. His duty was to deal fairly with the Company in making such estimate. The special finding shows that he discharged that duty and observed good faith. We shall not presume that the Company, after requiring the assured in his application to give the "estimated value," and then to covenant that he had stated all material facts in regard to such value, so far as known to him, and after carrying that covenant, by express words, into the written contract, intended to abandon the theory upon which it sought the contract, and make the absolute correctness of such estimated value a condition precedent to any insurance whatever. The application, with its covenant and stipulations, having been made a part of the policy, that presumption cannot be indulged without imputing to the Company a purpose, by studied intricacy or an ingenious framing of the policy, to entrap the assured into incurring obligations which, perhaps, he had no thought of assuming.

Two constructions of the contract may be suggested. One is to regard the warranty expressed in the policy as limited or qualified by the terms of the application. In that view, the assured would be held as only warranting that he had stated all material facts in regard to the condition, situation, value and risk of the property, so far as they were known to

him. This is, perhaps, the construction most consistent with the literal import of the terms used in the application and the policy. The other construction is, to regard the warranty as relating only to matters of which the assured had or should be presumed to have had distinct, definite knowledge, and not to such matters as values, which depend upon mere opinion or probabilities. But without adopting either of these constructions, we rest the conclusion already indicated upon the broad ground that when a policy of insurance contains contradictory provisions, or had been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligations of a warranty. The Company cannot justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we shall assume, both of protecting the Company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself.

Wherefore, as it does not clearly appear that the parties intended that the validity of the contract of insurance should depend upon the absolute correctness of the estimates of value, and as it does appear that such estimates were made by the assured without any intention to defraud, our opinion is that the facts found do not support the judgment.

The judgment is, therefore, reversed, with directions to enter a judgment upon the special finding for the plaintiff in error.

Accord. Mutual Fire Ins. Co. v. Colesville Shoe Factory, 80 Pa. State 467; Dwelling House Ins. Co. v. Herdie, 37 Kan. 674.

Note. The owners insured a steamboat while navigating the Ohio and Miss. rivers below Cairo. The boat made a trip outside the designated course. After its safe return to the waters as provided in the policy, she was destroyed by fire. *Held,* there was a temporary suspension of the liability while the boat was outside of permitted waters, but the policy was in force at time of loss. Wilkins v. Tobacco Ins. Co., 30 Ohio 317.

GERMANIA FIRE INS. CO. v. DECKARD.

Appellate Court of Indiana. Oct. 1891. 3 Ind. App. 361.

False Representation. Pleading. Rioters.

Crumpacker, J. This action was brought by John Deckard against the Germania Fire Insurance Company upon a policy of fire insurance issued by the latter. The complaint was in two paragraphs, to which a separate demurrer was filed and overruled. The answer contained ten paragraphs, and a demurrer was sustained to the 2d, 3d, 4th, 5th, 6th, 7th, and 9th, and overruled as to the others. A jury trial was had, and a special verdict returned, and motions by the defendant for a venire de novo, for judgment in its favor upon the verdict, and for a new trial were successively made and overruled, and judgment was awarded plaintiff upon the verdict. The assignments of error properly present for review the several rulings of the trial court upon the demurrers and motions.

Counsel for appellant first insists that the first paragraph of complaint is not sufficient to withstand the demurrer. The averments of this paragraph are substantially these: The plaintiff was the owner of a one-story, shingle-roof, box-frame dwelling-house in Monroe county, Ind., which was occupied by a tenant; and, in consideration of a premium of $3 to it in hand paid, the defendant, on the 2d day of November, 1889, by its policy of fire insurance, which was filed with and made part of the complaint, insured said dwelling-house against loss or damage by fire in the sum of $300 for the term of three years from said date; that the plaintiff "performed all of the conditions on his part to be performed, and on the 16th day of May, 1890, said house was totally destroyed by fire; that plaintiff immediately thereafter, on the —— day of June, 1890, notified the defendant of said loss, and more than ninety days before the bringing of this suit gave defendant due proofs of said loss." It was further alleged that plaintiff was the owner of the house at the time it was destroyed, and it was of the value of $300, and that the

amount of the policy was due and unpaid. Among other provisions, the policy contained the following: "Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company." The point is raised against this paragraph of complaint that it does not show a compliance with the above provision of the policy. It was incumbent upon the holder of the policy to allege and prove a performance of all conditions precedent to his right to recover, or show a waiver or other sufficient excuse for their non-performance. Section 3770, Rev. St. 1881, makes conditions inserted in insurance policies issued by foreign insurance companies requiring notice of loss to be given forthwith, or within less than five days, null and void. The effect of this section, as construed by the supreme court in the case of Insurance Co. v. Brim, 111 Ind. 281, 12 N. E. Rep. 315, is to render provisions for notice forthwith, or within less than five days, conclusively unreasonable, but to require the insured to use reasonable diligence in giving notice of loss. An elementary rule of pleading requires that averments shall be most strongly construed against the pleader, and under the influence of this rule, in the absence of other controlling allegations, the blank date should be supplied by constructively inserting the last day of the month. A general averment of the performance of all conditions upon the part of the insured, required by the terms of the contract, is ordinarily sufficient. This averment is in the complaint under consideration, but it precedes the allegations of loss, and counsel insist that it qualified only the antecedent averments, and is therefore of no value, as showing a performance of conditions required after the loss. It was the evident intention of the pleader that it should apply to and qualify his conduct to the time of the commencement of the action, and, notwithstanding its dislocation, we are inclined to give it that construction. Another elementary rule of pleading requires that specific averments shall control general ones, but this is applicable only where there is a necessary conflict between them. If the date of giving notice had been supplied by the pleader, it would determine the sufficiency of the complaint upon this question, notwithstanding the general averment of the per-

formance of conditions. Baker v. Insurance Co., 124 Ind. 490, 24 N. E. Rep. 1041. But we do not think the rule can be carried to the extent that specific averments like the one under consideration may be enlarged by construction, so that they shall control and render nugatory general averments which would otherwise be sufficient. Pleadings should be construed in such a manner as to reconcile and harmonize the various allegations when it can be done without doing violence to the laws of language, and, under the operation of this principle, the general averment of performance would so modify the specific averment in the complaint under consideration as to require the blank to be supplied by inserting the first day of the month, if this will make the complaint good. Under this construction, it would appear that notice of loss was given 15 days after it occurred; and, in the presence of the averment that it was given forthwith, and of the performance of conditions, we cannot say, as a matter of law, that it was not within a reasonable time. The complaint seems to have been very carelessly prepared, but we are inclined to hold it good.

The next alleged error relied upon for a reversal of the judgment relates to the decision of the court in sustaining the demurrer to the seventh paragraph of answer. This paragraph alleged that the insured building was described in the policy as a " 'one-story, shingle-roof, box and frame building,' meaning that said building was one story high, and was covered with shingles, and was constructed in box shape; that is, planks nailed upon a wooden frame, said planks standing endwise up and down said building;" that the insured stated and represented such facts to be true, and the company relied upon such statements and representations, and was induced thereby to assume the risk; that said statements and representations were false, and made to deceive the company, and to fraudulently procure the insurance, that said building was not as represented, but was "constructed of logs cut and laid one upon another, having but a slight box-frame addition thereto;" and that it was covered with "clap-boards" instead of shingles. It was also alleged that the policy contained a provision making the insurance void for any fraud,

false representation, or concealment of facts by the assured relative to the conditions, situation, use or occupation of the building. There is an attempt in this paragraph to enlarge the meaning of the descriptive terms of the policy by averment, and to make this enlarged meaning the basis of a defense. This is unauthorized by the universal law of contracts and pleadings. The parties are bound by the ordinary and natural import and meaning of the language employed in the contract, and, if it is susceptible of two constructions, that which is the most favorable to the assured shall prevail. Rogers v. Insurance Co., 121 Ind. 570, 23 N. E. Rep. 498; Wallace v. Insurance Co., 41 Fed. Rep. 742.

Then this answer clearly proceeds upon the theory of false representations and concealment of facts which induced the company to assume the risk. Fraud and misrepresentation in the procurement of a contract, when pleaded as such, will not authorize its overthrow or rescission, unless they relate to and affect some material feature of the transaction. In insurance contracts, only that can be regarded as material which, from a business standpoint, may have influenced the insurer in undertaking the risk. There is nothing in this answer to show that the hazard was increased a farthing on account of the alleged misrepresentation, or that the company would have refused it, or charged a higher premium for carrying it, if it had known the truth. What the result would have been if the facts set out in the answer under consideration had been made the basis of a defense on the ground of a breach of warranty, it is unnecessary to say. There was no error in overruling the demurrer to it as it stood.

The policy provided that the insurance should be void should there be any "increase of hazard by change of use or occupancy, vacancy, or non-occupancy," unless specially agreed to by the company in writing. The ninth paragraph of answer alleged that the building was insured as a dwelling-house only, and after the execution of the policy, without the knowledge or consent of the company, the use of the building was changed by the insured, "in this: that said building was not used for a dwelling only, but was used and occupied as a saloon; that wines, malt liquors, whisky, manu-

factured tobacco, and cigars were kept therein for sale, and were therein sold to the citizens of said vicinity;" whereby the hazard assumed under the contract was increased, and the policy became void. We learn from briefs of counsel that the trial court held this paragraph of answer bad, upon the ground that the breach of a condition subsequent to the execution of the policy, in the absence of fraud, would not defeat it; and upon the further ground that the change of use described did not increase the hazard, upon the authority of Behler v. Insurance Co., 68 Ind. 347. A statement in a policy of fire insurance that the building insured is used for a specific purpose amounts to a warranty that it was so used at the time the policy was issued, but it does not warrant the continuance of such use during the existence of the insurance. Baker v. Insurance Co., supra; Herrick v. Insurance Co., 48 Me. 558; Protection Co. v. Douglas, 58 Pa. St. 419; Wynne v. Insurance Co., 71 N. C. 121; Rafferty v. Insurance Co., 18 N. J. Law, 480. Warranties are classified as "affirmative" and "promissory" or "continuing." An affirmative warranty is an agreement that the validity of the contract shall depend upon the exact and literal truth and fulfillment of the things agreed upon as existing at the time it is made. A promissory warranty, in insurance contracts, is an agreement upon the part of the assured that he will do, or refrain from doing, certain specified things after the policy has been issued. May, Ins. § 157; Lawson, Rights, Rem. & Pr. § 2051. In the case under consideration, the agreement in the policy that the assured should not subsequently change the use of the building so as to increase the hazard was a promissory warranty, the substantial breach of which, either with or without actual fraud, would defeat the policy without regard to its being the cause of the loss. Rogers v. Insurance Co., supra; Insurance Co. v. Kyle, 124 Ind. 132, 24 N. E. Rep. 727; Howell v. Society, 16 Md. 377; Williams v. Insurance Co., 57 N. Y. 274; Mead v. Insurance Co., 7 N. Y. 530; Mack v. Insurance Co., 106 N. Y. 560, 13 N. E. Rep. 343; Assurance Co. v. McPike, 62 Miss. 740; Association v. Williamson, 26 Pa. St. 196; Luce v. Insurance Co., 105 Mass. 297; Blumer v.

Insurance Co., 45 Wis. 622. A violation of continuing representations, perhaps, will not defeat a policy of insurance, unless material, and accompanied with actual fraud. May, Ins. § 182; Lawson, Rights, Rem. & Pr. § 2055. But we know of no instance in which this doctrine has been applied to continuing warranties. The force and validity of a warranty against a subsequent change of the use of property insured, increasing the risk, is unquestioned. Whether a particular change will increase the hazard is a question of fact, to be submitted to the jury under proper instructions. Insurance Co. v. Steiger, 124 Ill. 81, 16 N. E. Rep. 95; Russell v. Insurance Co., 71 Iowa, 69, 32 N. W. Rep. 95; Smith v. Insurance Co., 32 N. Y. 399; Williams v. Insurance Co., 57 N. Y. 274; Griswold v. Insurance Co., 70 Mo. 654; Washington Mutual Ins. Co. v. Merchants', etc., Ins. Co., 5 Ohio St. 450; Peck v. Insurance Co., 45 U. C. Q. B. 620. In the case of Behler v. Insurance Co., supra, it was said: "We cannot perceive how the use of the building for prostitution would be more likely to endanger it to fire than if it were used for the accommodation of guests as a hotel; nor how the illegal sale of intoxicating liquors was any more hazardous to the building than if they had been sold legally under a license; nor, indeed, how the sale of intoxicating liquors within the building would endanger it at all;" and this is confidently relied upon by appellee in support of the decision of the trial court. In that case the policy contained no provision making it void if the use should be changed to increase the hazard. The only provision with the respect to change of use or occupancy was that the building should not be used for any illegal purposes, and the only penalty for a violation of the restriction was the following: "If the buildings previously insured are appropriated to such use during the time of insurance, the agent must either insist upon the removal of the danger or cancellation of the policy." The answer alleged that the use of the building had been changed to illegal purposes, specifying them. The question of the increase of hazard was not before the court, because it was not in the contract, and that part of the opinion above quoted was not necessary to the decision of the questions involved in the

case. Furthermore, that part of the case was impliedly overruled by the case of Insurance Co. v. Brehm, 88 Ind. 578, wherein the court said: "The conversion of an ordinary sleeping apartment into a house of assignation and prostitution, kept in a disorderly manner, evidently constitutes a material change in the nature and character of the occupation of the house, and ought, in a proper case, to be so held when pleaded and proven." It was unnecessary to set out the policy with the answer. Where an instrument is made the basis of an action, and is set out with the complaint, it is not necessary to set it out with an answer based upon any of its conditions or provisions. Grubbs v. Morris, 103 Ind. 166, 2 N. E. Rep. 579. The demurrer to the ninth paragraph of answer ought to have been overruled.

By the terms of the policy it was agreed that the insurance should not cover "any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power." One paragraph of answer set up the defense that the building in question was destroyed by fire by means of a riot. The findings of the jury upon this issue are contained in paragraphs 7 and 8 of the verdict, which are as follows: "(7) That said building was, on the night of the 16th day of May, 1890, by three or more men, in a forcible manner, broken into, and afterwards burned. (8) That on the night of the 16th of May, 1890, five men, with their faces disguised, came together at said building, and with a fence-rail forcibly broke open the door of the building, and three of them entered, and told the tenant therein to get out of bed and out of the house, under threats that if he did not they would roast him, saying, 'We are going to burn the house.' They led said tenant away from the building." No question is raised challenging the validity of that part of the contract under consideration, nor, indeed, can we perceive upon what grounds it could be successfully challenged. Barton v. Insurance Co., 42 Mo. 156; Insurance Co. v. Schwenk, 95 Pa. St. 89; Dupin v. Insurance Co., 5 La. Ann. 482; May, Ins. § 403; 7 Amer. & Eng. Enc. Law, p. 1042. It is argued, however, that the verdict does not show that the house was burned by the

rioters. We think it fairly appears that it was so burned. The seventh paragraph of the verdict states that the house was broken into forcibly, and afterwards burned by three or more men, on the night of the 16th of May, 1890. The eighth paragraph contains a more elaborate description of the men, and their assemblying and unlawful conduct. Where five masked men, in the night-time, assemble and forcibly break into a dwelling-house, and compel the occupant to vacate under threats of personal violence, and then burn down the building, it constitutes a "riot," within the legal definition of that term. Rev. St. 1881, § 1981; State v. Acra, 28 N. E. Rep. 570 (at this term). The court erred in awarding appellee judgment upon the verdict. The judgment is reversed, at appellee's costs, with instructions to overrule the demurrer to the ninth paragraph of answer.

AMERICAN BONDING & TRUST CO. OF BALTIMORE, MD., v. BURKE et al.

Supreme Court of Colorado. March 5, 1906. Rehearing Denied April 2, 1906. 36 Col. 49.

Fidelity Insurance—Construction of Contract—Warranties—Representations.

Campbell, J. This is an action on a bond of indemnity issued by the appellant bonding company, a corporation, to the S. T. Miller Investment Company, a corporation, obligee, to save the latter harmless against loss occasioned by the larceny or embezzlement of its general manager, S. T. Miller. The action is brought by the plaintiffs Burke and Fry, as the assignees of the original obligee's alleged cause of action upon the bond. The indemnity was applied for by S. T. Miller, the employé. According to the custom, what is called in the record an "Employer's Statement" was required of the obligee. This statement consists of a list of printed questions to which the obligor deemed it material

to have the answers of the employer before issuing the policy. To the questions embodied in the statement first sent out, answers were made by Burke, the president of the investment company, and one of the plaintiffs, and returned to the obligor. These answers were unsatisfactory to the obligor, which declined to take the risk upon them as a basis, but sent an executed bond, as applied for, to its local agents at Cripple Creek with directions not to deliver the same until a satisfactory employer's statement was returned. At about the same time the obligor sent to the obligee a second statement or printed list, like the first one, with the information that it desired to have answered the questions therein propounded, and that such answers would be taken as the basis of the bond, if issued.

There is no question but that Burke, as president of the investment company, had full authority to make these answers, and the bond was accepted by that company which paid the premium upon it. The second statement was made by Burke and delivered to the company on May 29, 1901. The bond was dated May 14, 1901, and about May 20th, delivered to the obligee, though contrary to the instructions of the obligor; but that feature is not important here. When Burke made the answers contained in the second statement, he knew that it was the intention of the obligor not to issue the bond until a satisfactory statement was made by him, and when he did make and return it he knew that the bond of May 14th had been delivered, and then expressly agreed that the statement should be a condition precedent to the binding force of the contract of indemnity. Indeed, Burke was the only officer of the company in Colorado during the time of the various transactions who was authorized to act for the company, Miller, the employé, being the only other official in the state. Included in the second statement were the following questions and answers: "Q. When were his accounts last examined? A. April. Q. Were they at that time in every respect correct, and proper securities, funds and values on hand to balance? A. Yes. Q. Is there now, to your knowledge, any shortage due you by applicant? A. No. Q. Has he ever been short with you?

A. No. Q. Is he now in debt to you? A. No." At the end of these questions and answers was the following statement, and immediately before the signature of the investment company: "It is agreed that the above answers are to be taken as conditions precedent, and as the basis of the said bond applied for, or any renewal or continuation of the same, that may be issued by the American Bonding & Trust Company of Baltimore City to the undersigned, upon the person above named." The bond expressly recited that it was made, issued, and accepted upon the condition, inter alia, that all the representations made by the employer, his or its officers, to the surety company are warranted by the employer to be true. Before a court and jury there was a verdict for the plaintiff, and the defendant company has appealed and made numerous assignments of error.

1. The objections that the complaint does not state facts sufficient to constitute a cause of action, and that the plaintiffs have not the legal capacity to sue for the breach of this bond because there was no valid assignment of the obligee's cause of action thereunder, are not discussed. A correct disposition of these and some other assignments of error to which we shall give no further attention might require a reversal of the judgment and a remanding of the cause for a new trial; but in the view we take of the case it is important to consider only one or two propositions, the determination of which makes the bond unenforceable, and compels a dismissal of the action.

2. Learned counsel for both parties are in accord that this instrument, for a breach of whose conditions the action was brought, though denominated a bond, is, in legal effect, analogous to a policy of insurance. Speaking, generally, the same rules of interpretation and construction, therefore, that apply to fire and life insurance policies are applicable to it. If its language is uncertain or ambiguous, the interpretation must be in favor of the insured; and if any of its clauses is susceptible of two constructions, one in favor of the insurer and the other in favor of the insured, the latter will prevail if it is consistent with the general object for which the bond is given. Statements or declarations by the

insured are to be taken as representations merely and not warranties unless the written contract of indemnity itself expressly, or by appropriate reference, makes them warranties. Under the conceded facts of this case, it is immaterial whether the answers set out in the foregoing statement be considered warranties or representations, as a review of some of the authorities demonstrates. A case quite in point in many respects to the one in hand is Rice v. Fidelity & Deposit Company, 103 Fed. 427, 43 C. C. A. 270. It was there held that since the bond under consideration rested upon the faith of the employer's statement, and because in the latter there was an express agreement that the statement should be taken as a condition precedent and as the basis of the bond, the answers to the questions propounded were to be deemed warranties and not representations. It was said in the opinion that the crucial distinction between a representation and a warranty is that one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate. But suppose the declarations of the employer are mere representations. In Ostrander on Fire Insurance (2d Ed.) § 135, the learned author says that the difference between a warranty and a representation lies in the fact that in the former the question of materiality is closed; in the latter it is left open. If untrue in the former case, the policy is voidable at the option of the obligor; if untrue in the latter, and also material, the same result follows. The same author at section 139 says that warranties and conditions precedent are essentially the same, and if they are untrue, the policy issued upon the basis of them is voidable.

In State Ins. Co. v. Du Bois, 7 Colo. App. 214, 224, 44 Pac. 756, the court referred with approval to 1st Wood on Insurance, § 236, where it is said that, in order to avoid a policy on the ground of misrepresentation on the part of the insured, it is not necessary that a fraudulent purpose or intent on his part should be established. It is enough if the representation was, in fact, false and was material to the risk.

In Travelers' Ins. Co. v. Lampkin, 5 Colo. App. 177, 38 Pac. 335, the same doctrine is announced. In American Credit Co. v. Carrollton Fur. Mfg. Co., 95 Fed. 111, 36 C. C. A. 671, the same doctrine is laid down. In the Jefferson Ins. Co. v. Cotheal, 7 Wend. (N. Y.) 73, 22 Am. Dec. 567, the court says that a false representation is no breach of the contract unless made a warranty, but if material the representation avoids the policy on the ground of fraud, or because the underwriter has been misled by it. In the leading case of Pawson v. Watson, 2 Cowper, 785, Lord Mansfield, with great clearness, presents the point that "if there is fraud in a representation, it will avoid the policy, as a fraud, but not as a part of the agreement." And in speaking of a representation made by the applicant as to his own knowledge concerning which he knows nothing, though acting in good faith, the great jurist said: "It is equally false to undertake to say that which he knows nothing at all of, as to say that is true, which he knows is not true." The better and great weight of authority is that a false representation, even though not a warranty, if it be of a fact material to the risk, avoids the policy irrespective of the good faith of the one who makes it. Carpenter v. Am. Ins. Co., 1 Story, 57, Fed. Cas. No. 2,428; Carrollton Fur. Co. v. American Credit Indem. Co., 124 Fed. 25, 59 C. C. A. 545.

In the latter case Judge Wallace quotes with approval the language of the court in Campbell v. N. E. M. Life I. Co., 98 Mass. 402. One of the points there ruled was that where the question of the materiality of the representation depends upon circumstances, and not upon the construction of any writing, it is a question of fact to be determined by the jury; but where the representations are in writing, their interpretation, like that of any other instrument, belongs to the court.

In Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595, the court, in a case quite similar to the one we are considering, held that answers made in response to specific inquiries of the obligor, independent of the stipulations and warranties made in the application and certificate, were material to the risk assumed; and, being material and untrue, there could be no recovery by the obligee.

In Warren Dep. Bank v. Fidelity Co., 116 Ky. 38, 74 S. W. 1111, it was held that where misrepresentations are material to the risk, and are unquestionably false, whether they are fraudulent or not is immaterial, the policy may be avoided by the obligor where he has relied upon the truthfulness of the statements and has been deceived thereby. The same court in U. S. Fid. & G. Co. v. Blackly et al., 77 S. W. 709, affirms the Warren Case.

In Guarantee Co. v. Nat. Bank, 95 Va. 480, 28 S. E. 909, the court said that where representations were of existing facts and were material and presumably within the peculiar knowledge of the applicant and constituted an inducement to the obligor on which it had a right to rely, and in relying upon which executed the bond, if the representations were untrue, it is immaterial whether plaintiff knew that they were false or honestly believed them to be true. For it was said that if a party innocently misrepresents a fact by mistake, the effect is the same on the party who is misled thereby as if he who made the misrepresentation knew it to be positively false. The real question in such a case is not what the party making the representation knew or believed, but was the representation false and the other party misled by it.

In Carrollton Fur. Co. v. American Cr. I. Co., 115 Fed. 77, 52 C. C. A. 671, the language of Judge Story in Carpenter v. Am. Ins. Co., supra, was quoted with approval. The late case of Guarantee Co. v. Mechanic's Co., 183 U. S. 402, 22 Sup. Ct. 124, 46 L. Ed. 253, is in line with these cases. Bankers' Life Ins. Co. v. Miller (Md.) 59 Atl. 116, says that a material representation, substantially false, made by an applicant for life insurance, in reliance upon which a policy is issued to him, avoids the policy, whether it be made intentionally, or in good faith. See, also, 16 Am. & Eng. Enc. Law (2d Ed.) 933. To the same point are cases in our own reports. In Stimson v. Helps, 9 Colo. 33, 10 Pac. 290, the court says that a contracting party is liable for fraud upon his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to

the other party, where the representations were false and the other party, relying upon them, has been misled to his injury; and it was said that it is not necessary in order to constitute the fraud that the party who makes a false representation should know it to be false. If he makes it as of his own knowledge, not knowing whether it be true or false, and it is in fact untrue, he is guilty of fraud as much as if he knew it to be untrue. In such a case, he acts to his own knowledge falsely, and the law imputes a fraudulent intent.

In Lahay v. City Nat. Bank of Denver, 15 Colo. 339, 25 Pac. 704, 22 Am. St. Rep. 407, and in Connell v. El Paso, G. M. & M. Co., 33 Colo., 30, 78 Pac. 677, this doctrine is approved.

Our conclusion, therefore, is that a misrepresentation material to the risk, made in response to a specific inquiry, upon which an obligor relies to his injury, avoids the policy at the option of the latter. So that, applying the principle to the facts of this case, whether Burke's answers given to the questions propounded by the obligor were warranties or representations merely, they avoid the policy, if, in fact, untrue, irrespective of his good faith in making them. That they were material to the risk is without question, and it was the duty of the court below so to declare from the written language itself. That the answers were untrue is conceded, and that the facts were presumably within the knowledge of that officer is beyond question. The employe was indebted to the investment company obligee at the time, and was, and for several weeks has been, a defaulter. No examination whatever was made of the books of the company in April, or at any other time, by any of its officers, or by any other person, and if such examination had been made the notes upon their face would have shown that the answers which the president made in response to the specific inquiries were absolutely untrue. The court below admitted the second employer's statement over the objection of the plaintiff, though it was not made or delivered until after the bond was issued. Not having assigned cross-error, the plaintiffs ar not in position to question this action, even if it

was wrong. But the court was right in its ruling, and the second employer's statement must be considered as the basis of the bond, upon the strength of which the same was issued. At the time the answers of the obligee's president were made and the statement sent to the obligor, this officer knew that a satisfactory statement was a condition precedent to the issuance and delivery of the bond, and the rights of the parties are, therefore, to be measured the same as though the statement preceded it, or was contemporaneous therewith. For another reason, also, the plaintiffs are bound by this statement. Even if the bond was issued without a preliminary employer's statement, it was as competent for the parties to make a new agreement or modify the old as it was for them to enter into the original contract. By the express terms of the second employer's statement there was an agreement of the parties that it should be taken and deemed as the basis of the bond. In Rice v. Fid. & Dep. Co., supra, this question is so ruled. The trial court in its various rulings upon the evidence and in its instructions to the jury proceeded upon an erroneous theory. It declared not only that there were no warranties by the employer of the truthfulness of its statements, but that, even though the answers which have been quoted were false, the plaintiffs' recovery was not defeated unless they were fraudulently made and with the knowledge upon the part of the president of the obligee company that they were false at the time they were made. Upon the uncontradicted facts in this record the trial court should have directed the jury to find for the defendant since the representations of the obligee were in response to the obligor's specific inquiries, they were material to the risk, and were false and fraudulent in fact and in law. The obligor expressly advised the obligee that the answers were deemed material. We think they were material to the risk as matter of law. They were untrue in their entirety. The obligor relied upon them, and had the right to rely upon them, and would not have issued the policy had the obligee made true answers.

The judgment is reversed, and the cause remanded, with instructions to dismiss the action.

CHAPTER X.

NOTICE AND PROOFS OF LOSS.

TRIPPE v. PROVIDENT FUND SOC.

Court of Appeals of New York. Nov. 28, 1893. 140 N. Y. 23.

Notice of Death. Time.

O'Brien, J. The defendant is an accident insurance company, upon the co-operative or assessment plan, and on the 13th day of March, 1891, issued its policy or certificate to Frederick W. Trippe, the plaintiff's intestate, whereby it agreed, upon the considerations referred to in the instrument, to pay to him certain sums specified as a weekly indemnity on account of disability from accidents within the terms of the contract, and also the sum of $5,000 in case of death "through external, violent and accidental means." The place of business of the insured was in a building near Park place, in the city of New York, which, on the 22d of August, 1891, fell, crushing to death in the ruins several of the occupants, and among them the insured. The destruction of this building, and the consequent loss of life, is known in the events of that year as the "Park Place Disaster." The claim is resisted by the defendant upon the ground that certain conditions expressed in the certificate, which were warranties or conditions, precedent to liability, have not been complied with. The most important question, and that most strenuously insisted upon by the defendant, arises upon the following condition: "Notice of any accidental injury, for which claim is to be made under this certificate, shall be given in writing, addressed to the president of the society at New York, stating the full name, occupation, and address of the

injured member, with full particulars of the accident and injury, and failure to give such written notice within ten days from the date of either injury or death shall invalidate any and all claims under this certificate."

There is nothing in the case to create any doubt as to the fact that the insured was killed on the day of the accident, but the fact was not known until the 25th, when the body was found among the ruins, and identified. Notice of the death was given to the defendant on the 2d day of September, which was within the 10 days from the discovery of the body, but not within 10 days from the day of the accident, when, as the defendant insists, the death must have occurred. The condition upon which the defense is based was to operate upon the contract of insurance only subsequent to the fact of a loss. It must therefore receive a liberal and reasonable construction in favor of the beneficiaries under the contract. McNally v. Insurance Co., 137 N. Y. 389, 33 N. E. Rep. 475. The provision requires not only notice of the death, but "full particulars of the accident and injury." It is quite conceivable that in many cases of death by accident the fact cannot be, and is not, known until days, or even weeks, after it has occurred. Such conditions in a policy of insurance must be considered as inserted for some reasonable and practical purpose, and not with a view of defeating a recovery in case of loss by requiring the parties interested to do something manifestly impossible. The object of the notice was to enable the defendant, within a reasonable time after the death or injury, to inquire into all the facts and circumstances while they were fresh in the memory of witnesses, in order to determine whether it was liable, or not, upon its contract. The full particulars of the death, which the condition requires, cannot, ordinarily, be furnished until the fact of death, and the manner in which it occurred, are ascertained. In this case, all that was known prior to the 25th of August, when the body was found, was the fact that the deceased had his place of business in the building, and that it had been destroyed. But it did not follow from these facts that the insured was dead, as he might have been absent from the building at the time, or in some way escaped from the result of the accident; and a notice served upon the defendant prior to the

time when the body was found, and the fact of death ascertained, would not be within the object or terms of the condition. The parties having contracted that the notice of death should be accompanied by full particulars of the manner in which it occurred, and the attendant circumstances, they evidently intended that it should be given only when the fact and manner of death became known to the parties who were required to act. The fair and reasonable construction of this condition, therefore, is that the 10 days within which the notice is to be given did not begin to run from the date of the accident, or the disappearance of the insured, but from the time when the body was found, and the important fact of death, with the circumstances and particulars under which it occurred, ascertained. This construction secures to the defendant every benefit and advantage that was intended by this provision of the policy, and it cannot, therefore, complain if the very harsh and technical meaning which it now seeks to put upon a condition subsequent is rejected. The plaintiff was the widow of the deceased, and the beneficiary named in the certificate. She was the only party interested in the enforcement of the contract, and who could give the notice; and she could not give it, within the meaning of the condition, until she had knowledge of the facts which she was bound to communicate. To hold that the plaintiff was bound to give notice of the death of her husband, with full particulars, before she had any knowledge of the facts, would be to require her, by a technical and literal construction, to do an impossible thing, which was not within the intention of the parties when the contract was made. Insurance Co. v. Boykin, 12 Wall. 433.

But, even if the defendant's construction of this condition was correct, we think, by its acts, the objection has been waived, and cannot now be urged as a defense. The notice served on the 2d of September was retained, without objection, and another served on the 15th of October, after the plaintiff had been appointed administratrix. On the 12th day of October, upon written application to the defendant, it furnished the necessary blanks for proofs of loss. These proofs were made and forwarded to the defendant, in compliance with the terms of the contract, and were retained without objection.

On the 19th of March following, the defendant called for further information, which was given. It is well settled that such defenses are waived when the company, with knowledge of all the facts, requires the assured, by virtue of the contract, to do some act, or incur some expense or trouble, inconsistent with the claim that the contract had become inoperative in consequence of a breach of some of the conditions. McNally v. Insurance Co., supra; Roby v. Insurance Co., 120 N. Y. 510, 24 N. E. Rep. 808; Titus v. Insurance Co., 81 N. Y. 410, 419; Benninghoff v. Insurance Co., 93 N. Y. 495; Goodwin v. Insurance Co., 73 N. Y. 480; Brink v. Insurance Co., 80 N. Y. 108; Jones v. Insurance Co., 117 N. Y. 103, 22 N. E. Rep. 578; Armstrong v. Insurance Co., 130 N. Y. 560, 29 N. E. Rep. 991; Insurance Co. v. Edwards, 122 U. S. 457, 7 Sup. Ct. Rep. 1249. The acts of the defendant in receiving and retaining these papers, without objection, and calling for others, are consistent only with the theory that the contract was still considered in force; and as the plaintiff acted accordingly in performance of its conditions, subsequent to the loss, the defendant ought not to be permitted now to change its position, and assert that after 10 days from the accident the obligations of the policy virtually ceased, by reason of failure within that time to serve notice of death.

The deceased stated in his application, which is part of the policy, and a warranty, that his business was that of a "wholesale drug merchant." It is now urged that the contract is avoided for the reason that this statement or representation was untrue. This point is based upon evidence tending to show that some of the articles that the deceased kept in his store, and dealt in, were of such a character as to deprive him of the right to be classified for accidental insurance as a wholesale druggist. Without further reference to the merits of this objection, it is sufficient to say that it is not available to the defendant in this court, for the reason that the testimony introduced did not conclusively establish any breach of warranty in this respect. At best, the question was one of fact, and the disposition made of it by the learned trial judge was sufficiently favorable to the defendant, when he submitted it to the jury. No exception was taken by the

defendant to this course, or to the instructions given by the court to the jury upon the submission of the question, and, obviously, none could have been. In fact, the only question submitted to the jury was whether this statement was true. The only objection that the defendant made to this disposition of the case was to request a submission, also, of the question as to the date of the death of the insured, which request was properly refused, as the sufficiency of the notice of death served presented a question of law.

The other exceptions in the record have been examined, and, as they disclose no error prejudicial to the defendant, the judgment should be affirmed. All concur.

KENTZLER v. AMERICAN MUT. ACC. ASS'N.

Supreme Court of Wisconsin. Nov. 13, 1894. 88 Wis. 589.

Accident Insurance—Notice and Proofs of Loss. Time.

Action by Emma Kentzler, by John Nechtges, as guardian ad litem, against the American Mutual Accident Association on a policy of accident insurance. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

It appears from the record that about 1886 the parents of the plaintiff, Emma, had separated at or near Detroit, Mich., and always thereafter continued to live separate. That Emma and her mother remained in Michigan, but that Emma's father, Joseph Kentzler, went to Ashland, in this state, and in 1892 he was employed as an engineer of a tugboat operated by the Ashland Brown-Stone Company on Chequamegon Bay, under Capt. John Herbert, who, with the engineer, fireman, and steward, made up the crew, and all lived and slept on the tug. That September 20, 1892, the said Joseph Kentzler became a member of the defendant association, and obtained from it a certificate of membership, containing, among other things, the following: "The American Mutual Accident Association of Oshkosh, Wisconsin, in considera-

tion of the membership fee and the warranties and agreements contained in his application for membership, hereby accepts Joseph Kentzler, of Ashland, Wisconsin, being a stationary engineer, under classification 'C,' and insures him against injuries through external, violent, and accidental means for five years, subject to its by-laws," in a manner therein named; among others, that "(5) if such injury shall cause the death of such member, within ninety days will pay $1,500 to Emma Kentzler, daughter, or, in event of her prior death, to the legal representative of such member; that the conditions upon which this certificate is issued and accepted by the insured member are, among other things, that notice in writing of any claim made shall be given the secretary of the association, at Oshkosh, Wisconsin, with full particulars of the accident and injury, immediately after the accident occurs; that proofs of death, in like manner and time, shall be verified by the attending physician, or some other person having personal knowledge of the fact; that unless positive proof of death or injury and duration of disability, and that the same resulted from bodily injuries covered by this insurance, shall be furnished to the association within six months of the date of the accident, then all claims thereon shall be forfeited; that all claims shall be subject to proof of insurable interest, and payable within ninety days after proof of the injury; that no proceedings at law or in equity shall be brought, or arbitration required, to recover any sum hereunder, unless the same is commenced within one year from the date of the alleged injury; that the provisions and conditions herein, and those of the application herefor, are precedent to the issuing of this certificate and its validity; that this insurance does not cover disappearances, nor injuries of which there is no visible mark upon the body, nor death nor injury resulting wholly or in part, directly or indirectly, from any of the causes therein specified and not present here." That, on the same day said certificate was issued, the said Joseph Kentzler delivered the same to the said Capt. Herbert. That November 9, 1892, the tug lay next to a scow in the bay at Ashland. That in going onto the tug persons stepped from the scow to the tug without any plank or walk, and

without any difficulty. That about 11 o'clock on the evening of that day the said Joseph Kentzler was last seen at the St. Charles Hotel at Ashland, and started from there, apparently to go to said tug. That he was missed the next morning, and search made for him, without avail. That there was no ice in the bay at the time. That a couple of days afterwards the captain made a trip with the tug, but returned November 12 or 13, 1892, and placed the tug in the same place, next to the scow. That April 19, 1893, the ice in the bay broke up, and the body of said Joseph Kentzler was found in the bay between the tug and the scow. That search was immediately instituted for the said Emma by advertising in the Detroit papers, and making inquiries by letter of numerous officers and persons in Michigan. That in the early part of May, 1893, it was ascertained that she was in New Haven, Mich. That Emma didn't learn of her father's death until May 24, 1893, when she received information of the same at New Haven, Mich. That thereupon she immediately notified the secretary of the defendant of her father's death. That the defendant received such notice May 26, 1893. That July 12, 1893, Emma duly served and delivered to the defendant's secretary, at Oshkosh, proofs of her father's death, as prescribed in the policy, and demanded payment thereon. That October 28, 1893, Emma, through her guardian ad litem, Nechtges, commenced this action to recover the amount of such insurance. That the complaint herein contains allegations of the facts stated, in the usual form. That the defendant answered by way of admissions and denials, and, among other things, alleged that the plaintiff did not give immediate notice of the injuries causing the death of the insured, nor give proof of death, as required by the terms of the contract. That on or about July 14, 1893, the defendant received by mail what purported to be proofs of death of the insured, and notice of the fact that he had been drowned; but that said papers were returned with the following indorsement: "These papers returned, not served within the time required by the contract. W. E. Hobart, Secretary." At the close of the trial, the court refused to grant a nonsuit, or to direct a verdict in favor of

the defendant; thereupon the jury, by the direction of the court, returned a verdict in favor of the plaintiff, and assessed her damages at $1,500, with interest thereon from October 12, 1893. From the judgment entered thereon, accordingly, the defendant brings this appeal.

Cassoday, J. (after stating the facts). It may be fairly inferred from the circumstances attending the disappearance of Mr. Kentzler on the evening of November 9, 1892, and the finding of his body in the water of the bay, April 19, 1893, as mentioned in the foregoing statement, that as he went from the hotel to the tug for the purpose of retiring, and while in the act of stepping from the scow to the tug, he accidentally fell between the two into the water below, and was drowned. He was at the time about 46 years of age, in good health, and apparently sober, although he had taken a drink of whisky while at the hotel, and it is said that he was in the habit occasionally of having a "spree." By the express terms of the contract, it did "not cover disappearances." This being so, it is very manifest that had notice of his disappearance been given to the defendant's secretary November 10, 1892, and proofs of the circumstances under which he disappeared, with the suggestion that he had probably been drowned in the bay, been made out and sworn to, and delivered to the secretary, five months after Kentzler's disappearance, yet the defendant in all probability would have answered, in the language of the contract: "This insurance does not cover disappearances, and hence you have no claim against the association." Such was the contract,—that the defendant was subject to no liability, "unless positive proof of death" was made within the time and in the manner prescribed in the certificate. But it was utterly impossible to make such proof or give such notice until the body was discovered and identified, April 19, 1893. That was nearly six months after Kentzler had, in all probability, lost his life. Up to the time of such discovery and identification, the beneficiary was in no default, and under no obligations to give such notice, or furnish such proofs. But the contract expressly required notice to be given, "with full particulars of the accident and injury, immediately after the accident

occurs." It also expressly required that "proof of death in like manner and time shall be verified by the attending physician, or some other person having personal knowledge of the fact; and unless positive proof of death * * * shall be furnished to the association within six months of the date of the accident, then all claims thereon shall be forfeited." A contract should not be construed so as to forfeit or render nugatory the rights of one of the parties to it, unless the language employed imperatively requires such construction. In other words, an interpretation which gives effect is preferred to one which makes void. Besides, a contract should be interpreted in view of the conditions necessarily implied by law. It is a maxim in the law that "all words, whether they be in deeds, or statutes, or otherwise, if they be general, and not express and precise, shall be restrained unto the fitness of the matter and person." Webster v. Morris, 66 Wis. 395, 28 N. W. 353; Lessee of Brewer v. Blougher, 14 Pet. 198. When the ordinary meaning of the words employed leads to a manifest absurdity or repugnance, they may, if the instrument as a whole will permit it, be varied or modified so as to avoid such inconvenience, but no further. Becke v. Smith, 2 Mees. & W. 195; Turner v. Railroad Co., 10 Mees. & W. 434. In the case at bar the contract must have a reasonable construction, and in view of the conditions so implied by law. What is the object of giving such notice of the accident, injury, or death? In case of an injury or disability, not resulting in death, such notice affords the association an opportunity to ascertain the exact condition of the person, and apply the most effectual remedy. But in case of death there can be no remedy, and the only object of the notice is to secure evidence of identity. What is meant by giving notice "immediately after the accident occurs"? Does it mean, in the language of Webster: "In an immediate manner; without intervention of anything; without interval of time; without delay; instantly"? If the contract is to be thus literally construed, compliance by the beneficiary would seldom be possible. But courts, looking at the substance of contracts and statutes, have, during the last two centuries, repeatedly declared that: "The word 'immediately,' although in strict-

ness it excludes all mean times, yet, to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing." 9 Am. & Eng. Enc. Law, 931, citing numerous English and American cases in support of the proposition. The same language is quoted approvingly by Ryan, C. J., speaking for the whole court, in construing the words "immediate delivery," as used in section 2310, Rev. St.; in Richardson v. End, 43 Wis. 318; Stevens v. Breen, 75 Wis. 599, 44 N. W. 645. Applying this rule to the case at bar, the word "immediately" must be construed to mean such convenient time as was reasonably requisite for doing the thing required. That is to say, upon the discovery of the death, notice thereof was to be given in such convenient time as was reasonably requisite for doing so under the circumstances mentioned; and the proofs were to be furnished within the six months specified after such discovery. Besides, it is a maxim that the law does not require impossibilities. Thus, in the language of Hennen, J., "where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." Baily v. De Crespigny, L. R. 4 Q. B. 185. To the same effect, Taylor v. Caldwell, 3 Best & S. 826; Howell v. Coupland, L. R. 9 Q. B. 462, on appeal 1 Q. B. Div. 258; Insurance Co. v. Boykin, 12 Wall. 433. In the light of reason, as well as the authorities, we must hold that the action was not barred by the stipulation in the contract. The judgment of the circuit court is affirmed.

Accord. Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563; Woodman Accident Ass'n v. Byers, 62 Neb. 673, 55 L. R. A. 291.

Note. Where beneficiary could not know that death resulted from accident until after the verdict of a coroner's jury, *held* the time for giving notice under the policy did not begin to run until the verdict. Peele v. Provident Fund Ins. Co., 147 Ind. 543, 44 N. E. 661; Ewing v. Commercial Travelers Mut. Acc. Ass'n, 170 N. Y. 590.

Note 2. Where beneficiary did not know of existence of policy until after time for giving proof, *held* proof could be furnished within a reasonable time after knowledge. Konrad v. Union Casualty & Surety Co., 49 La. Ann. 636, 21 So. 721; McElroy v. John Hancock Mut. Life Ins. Co., 88 Md. 137, 41 A. 112.

Note 3. One month held not a reasonable time where no reasonable excuse was given for not giving notice sooner. Smith & Dove Mfg. Co. v. Travelers Ins. Co., 171 Mass. 357, 50 N. E. 516.

McELROY v. JOHN HANCOCK MUT. LIFE INS. CO. OF BOSTON.

Court of Appeals of Maryland. June 29, 1898. 88 Md. 137.

Proofs of Death.

Fowler, J. The John Hancock Mutual Life Insurance Company of Boston, Mass., on May 23, 1877, in consideration of the payment of an annual premium of $118, insured the life of Paul E. Dorsey in the sum of $2,000, for his own benefit. The policy was made subject to the laws of Massachusetts, which provide "that notice of the claim and proof of death shall be submitted to the company within ninety days after the decease." On the 1st of June, 1877, the insured assigned the policy to his brother Daniel Dorsey, of Baltimore, and the assignment was duly assented to by the company. Daniel Dorsey, the assignee, died in the year 1885; and in the same year, on August 14th, his will was admitted to probate in the orphans' court of Baltimore city. By this will he devised and bequeathed all the rest and residue of his estate to his son Joseph Dorsey and his daughter Annie J. Dorsey, and to them in trust for his two grandchildren. The proportions of the estate devised to each, and the particulars of the trust, are not important to be considered here. It is sufficient to say that nowhere, to the proceedings in the orphans' court as to the estate of Daniel Dorsey, does it appear that the policy assigned to him was distributed or even mentioned in the inventory. The estate of Daniel Dor-

sey having been fully administered, and the executor, Joseph Dorsey, having passed his final account, he, as executor, assigned to himself individually the policy, with the assent of the company, and also with the full consent of all the beneficiaries. It appears from the evidence that at the time of this transfer, the two grandchildren being minors, and having no means with which to pay their share of the premiums, and the remaining person interested in the policy, Annie J. Dorsey, being also unable to pay her share of maintaining it, it was agreed by all the parties in interest that the assignment should be made to Joseph Dorsey, and that he should pay the premiums out of his own money, and that, upon the death of the assured, the proceeds of the policy were to be divided according to the respective interests. This assignment to Joseph Dorsey was fully ratified and adopted by the minors after they arrived at age. It is admitted that all the premiums were duly paid up to and including that due on May 22, 1894. The premium due May 22, 1895, was not paid, but the payment of the premiums prior thereto, it is admitted, kept the policy in force until May 22, 1896. The premiums paid by Joseph Dorsey with his own money amounted to $1,002, and the whole amount of premiums actually paid is equal, or nearly so, to the full value of the policy. In 1891, Joseph Dorsey became insolvent, and the plaintiff, James W. McElroy, was appointed his permanent trustee in insolvency. Joseph Dorsey died in May, 1895, and, although his sister knew he had gone into insolvency, she took out letters on his estate, in order to get at a box with the safe-deposit company which he and she, during his life, had held jointly; and she testifies that she attempted to collect the insurance claim, because she supposed that was the proper way to do it. However, this fact is of no importance, except to explain how it happened that she, as administratrix, and not the trustee in insolvency, took the initial steps to obtain payment of the policy, and furnished proof of death. The insured died at the Home of Incurables, in the state of New York, on June 19, 1895; but this fact was unknown to Miss Dorsey for nearly a year, so that it was impossible for her to comply literally with the provision of the Massa-

chusetts law, which required proof of death to be given "within 90 days after the decease." But, as soon as she received information of the death of the insured, she notified the local agent of the company, and he sent her blanks for proof of death, which she filled up. These were objected to, and returned to her, because they were not correct; and other blanks were sent to her by the company, and these were also filled up, and sent to the company, in whose hands they have remained ever since. On October 16, 1896, about four months after the proofs were furnished, a letter from the local agent in Baltimore was received by her, containing the information that the company would recognize no claim under the policy, proofs not having been submitted in accordance with the Massachusetts statute applicable thereto, and that the company did not consider that she had any interest in the policy; whereupon she consulted counsel, who appealed to the company to settle the claim without regard to technical objections. But this appeal was in vain. On the 3d November the company wrote counsel that it had nothing to add to its letter of October 16th to his client, and that there was no defect in the formal proofs. This correspondence was closed on November 24, 1896, by a letter from the company saying that it had nothing further to say regarding the matter. Miss Dorsey, as administratrix of her brother, and as surviving trustee under her father's will, made another effort to collect the amount she considered justly due on the policy; and through the second attorney she consulted, she ascertained that the plaintiff, James W. McElroy, was trustee in insolvency of her brother, and was the proper person to prosecute a suit for the recovery of the insurance money. The plaintiff testifies that in February, 1897, he became aware for the first time of the existence of the policy, and of the death of the insured; that this information came to his knowledge from Miss Dorsey's "visit to the office of his associate; that witness took up the matter, and, upon investigation, found that Joseph Dorsey had applied for the benefit of the insolvent law of this state in 1891, and that witness was his trustee; that he put himself in communication promptly with the company." On February 9, 1897, two days after learning the facts

we have just stated, Mr. McElroy wrote to the local agent in Baltimore, informing him that he had only recently learned of his interest in the policy, and asking him if the proofs of death furnished by Miss Dorsey as administratrix, etc., were in due form, and, if not, what was necessary to be done by him, as trustee, in order to collect the insurance money. The agent forwarded this letter to the company at Boston, and in a few days Mr. McElroy received a reply in which the company says: "You are correct that Miss Dorsey filed the papers to prove the claim under this policy, and claimed the money. The papers in themselves, we think, are correct enough, but the company has decided not to recognize the claim under this policy, and Miss Dorsey has placed it in the hands of John H. Thomas," etc. "We think it might be well for you to see Miss Dorsey or Mr. Thomas, and see whether Miss Dorsey is intending to enter suit, as intimated in his letter. Until this matter is settled, we are unable to give you any definite information in regard to this case." Mr. McElroy replied that, unless some satisfactory arrangement for settlement could be made, he would enter suit. He was then informed for the first time by the company that, according to the provisions of the Massachusetts statute under which the policy was issued and continued in force, there was, strictly speaking, no claim, the proof not having been filed within 90 days of death; but the company closed its letter with an offer to settle both the claim of the trustee and of the administratrix by the payment of the sum of $652, declaring, however, that it was under no legal obligation to pay this sum. This suit was brought by the plaintiff in the usual form, as trustee in insolvency of Joseph Dorsey, to recover the amount claimed to be due on the policy. The defendant pleaded the general issue.

We have stated the facts at length which were offered in evidence by the plaintiff, for the reason that, at the close of his case, the learned judge below instructed the jury "that, under the pleadings in this case, the plaintiff has produced no evidence legally sufficient to enable him to recover, because the undisputed evidence shows the trustee in insolvency has no such interest in the policy sued on as enables him to maintain this suit." There are two other ques-

tions which, though not passed upon below, we will consider and dispose of, because they will necessarily arise in a retrial of the case; and, if the contention of the defendant company be correct as to these other questions, it would be useless to order a new trial, even though there may be error in other rulings of the court. Insurance Co. v. Langly, 62 Md. 215. The first of these questions is: Were the proofs of death, under the circumstances of this case, sent to the company in time? And, second, if not, was there a waiver by the company of the requirement as to furnishing proof of death within 90 days after death? The verdict and judgment were in favor of the defendant on the instruction of the court, and the plaintiff has appealed.

1. Has the plaintiff trustee such an interest in and title to the policy sued on as entitles him to bring this suit? It is manifest from the evidence we have fully stated that Joseph Dorsey, the plaintiff's insolvent, held the entire legal title to the policy. This he held under the assignment by himself as executor to himself in his own right. But he was also entitled absolutely, as one of the residuary legatees under his father's will, to an undivided fifth. In addition to holding the entire legal title by assignment and the beneficial interest as legatee, the insolvent was also entitled to an absolute interest in the proceeds of the policy to the extent of the premiums paid by him for the other beneficial owners of the policy. It is not important now to ascertain with exactness the extent of such interests of the insolvent, but it is sufficient that he had such substantial interests in the subject of controversy, and of this there is no doubt under all the evidence in the case, and the law applicable to it. Nor do we think there can be any doubt that the interests in, as well as the legal title to, the policy, which were vested in the insolvent, passed to the plaintiff, as trustee, under the operation of the insolvent law, for the benefit of his creditors. It was suggested that the interest of the insolvent in this policy passed to his administratrix. But this view is in conflict with what has been, from Alexander v. Ghiselin, 5 Gill, 180, down to the most recent decisions of this court, declared to be the spirit and intent of our insolvency system,

namely, that all of the estate of the insolvent should be administered in the insolvent court; and the fact that others may have either legal or equitable rights in or to the estate or property, the legal title to which is in the insolvent, will not prevent the insolvent court from adjudicating all questions that may arise, "that court having full power to determine the legal and equitable rights of the parties." Crocker v. Hopps, 78 Md. 265, 28 Atl. 99. But where the insolvent holds the bare legal title, without any beneficial interest whatever, his trustee cannot possibly take from him anything which is of any value to the creditors; and it may well be held that, under such circumstances, nothing, not even the legal title, passes to the trustee in insolvency. This distinction is drawn in Rhoades v. Blackiston, 106 Mass. 336, where it is said: "If, however, the bankrupt has any beneficial interest in the avails of the suit, then the whole legal title rests in his assignee, and the action must be in his name, for there cannot be two legal owners of one contract at the same time." See, also, Low v. Welch, 139 Mass. 33, 29 N. E. 216 The defendant has attempted to assail the validity of the assignment of the policy to the insolvent, and thus show that his trustee in insolvency has no better title. In order to do this, he contends that the evidence shows that some of those who assigned to the insolvent were infants, and that those infants and their aunt, Miss Dorsey, owned the larger part of the policy. But the evidence also shows that, if the assignment was made by minors, they ratified it fully after arriving at age. Nor do we think the evidence shows that the insolvent held merely as trustee. The remarks of Judge Dillon, who delivered the opinion of the court in Smith v. Insurance Co., 4 Dill. 353, Fed. Cas. No. 13,083, are particularly applicable to the position assumed by the defendant in this branch of the case. He said: "The company cannot set up such supposed rights in others to defeat an action on the policy. The wife, having the legal title, may maintain the action, and this will protect the company from another suit; and, in the event of recovery, the equities, if any exist, which I do not decide, can be adjusted in an action between them and the plaintiff. The administrators of the husband

are not here insisting upon their rights, if they have any, and the company cannot set up rights for them, and, on its action, introduce into this suit matters with which it has no concern." The plaintiff, therefore, having the legal title to, and also a large beneficial interest in, the policy, he was the proper party to bring this suit.

2. The second question we shall consider is whether, under all the circumstances of this case, the defendant can escape liability by the defense that the proofs of death were not furnished within 90 days after death. Whatever may be said in regard to the failure or negligence of the administratrix in not giving earlier notice and proof of death, she having been the first of those interested in the policy to hear of the insured's death, it can hardly be said, we think, that the plaintiff was guilty of any negligence whatever in this respect. It appears that, two days after he first heard that his insolvent held the policy, he promptly proceeded to inform the company of his rights, and to inquire if the proofs of death then already in its hands were in due form, and, if not, what was necessary for him to do as trustee, etc., in order to collect the proceeds of the policy for the insolvent estate of Joseph Dorsey. He was informed by the defendant that the papers (proofs of death) were correct enough, but that the claim would not be recognized. No new or additional proofs of death were ever asked for from the plaintiff, but, on the contrary, he was informed that those which had been sent were correct. But, very soon after its first letter to the plaintiff, the defendant told him that the proofs then in its hands had come too late. Of course, it was useless after that to attempt to supply any additional proof. Under these circumstances, and it appearing that the plaintiff never had, until a few days before he made his claim, the least information of the existence of the policy, nor any reason to induce him to make an investigation to discover if his insolvent had such an asset, can it be said, either upon reason or authority, that he or the creditors he represents should be bound by the 90-day provision of the Massachusetts law? It is perfectly clear that the rule was made for the ordinary cases where the existence of the policy and the death

of the insured are known or might or should be known in time to comply with the rule. It cannot reasonably be supposed that the holder of the policy could be required to give proof of a fact of which he was himself ignorant. "To decide that one was not duly diligent, and that he lost his right as beneficiary, because he did not give notice of a policy of which he knew nothing, would be more strict and exigent than, in our opinion, the language of the policy requires. There was timely notice given after the fact of insurance came to the knowledge of the plaintiff. This delay in finding the policy was not strange and unexceptionable. On the contrary, it appears to have been entirely consistent with good faith." Konrad v. Casualty Co. (La.) 21 South. 721. See, also, Accident Co. v. Gerisch, 163 Ill. 625, 45 N. E. 563; Kentzler v. Association, 88 Wis. 589, 60 N. W. 1002. In the case last cited, although the facts were different from those we are considering, yet the reasoning and the general principles announced may well be applied here. The court said: "A contract should not be so construed as to defeat or render nugatory the rights of one of the parties to it, unless the language employed imperatively requires such construction. In other words, an interpretation which gives effect is preferred to one which makes void. Besides, a contract should be interpreted in view of the conditions necessarily implied by law." As we already said, it would be unreasonable to require the plaintiff to have given the defendant notice or proof of facts of which he was ignorant, and which he could not have been reasonably expected to know before the day on which he received the information from Miss Dorsey.

3. But, independent of this view, we think there is ample evidence in this cause to establish a waiver by the defendant of the failure to send proofs of death within 90 days from the death of the insured. The following grounds, or any one of them, have been declared to be sufficient to constitute a waiver of any defect in, or defense arising out of failure to duly give notice and proof of death: "A proposal to settle;" "an absolute refusal to pay on the merits;" "a denial of all liability;" "a negotiation with the insured, without making the objection of defective proof of death." Bliss, Ins.

§ 268; Cooke, Life Ins p. 118. In its letter to the plaintiff, the defendant said: "The papers in themselves are correct enough, but the company has decided not to recognize the claim under this policy." Not a word here to indicate that its refusal to pay the plaintiff was because of want of seasonable proof of death. On the contrary, the only reasonable inference to draw from this language is that, without reference to any objection based on the proof of death, it had some meritorious defense on which it intended to rely. But, again, the defendant made a direct proposal to settle the claims of both the plaintiff and the administratrix of the insolvent by the payment of the sum of $652. Insurance Co. v. Traub (Md.) 37 Atl. 782. And, in addition to this, it may be fairly said that the defendant negotiated with the plaintiff without making the defense now relied on. It is true, it subsequently relied upon this defense; but, when it wrote the letter of the 15th February to him, it neither directly nor indirectly placed its refusal to pay upon want of proper proof of death. The letter closed thus: "We think it might be well for you to see Mr. Thomas, and see whether Miss Dorsey is intending to enter suit, as intimated in his letter. Until that matter is settled, we are unable to give you any definite information in regard to this case." The information asked for by the plaintiff was as to whether the proofs of death sent by Miss Dorsey were in due form, and, if not, what he should do to perfect his claim. If the defendant intended to rely upon the defense it now sets up, it should have said so. But it not only refrained from saying anything on the subject, but promised to give definite information after the dispute with Miss Dorsey had been disposed of. Why promise to give definite or any information if this defense was to be relied on? In May, 1896, Miss Dorsey sent proofs, and they were returned to her for further information, and during the same month the additional proof was forwarded. On the 23d June, it was approved by the medical examiner of the company. In the case of Hohn v. Casualty Co., 72 N. W. 1105, the supreme court of Michigan said: "An insurer waived a condition requiring notice of the accident to be given within a certain time, when it wrote for further informa-

tion." Bliss, Ins., supra; Cooke, Life Ins., supra; Insurance Co. v. Gibbs (N. J. Err. & App.) 29 Atl. 486. This defendant retained the additional or corrected proof of death without objection from June until the 16th October, some four months, when it wrote the letter of the latter date. This of itself constitutes a waiver of any objection to delay in sending proofs of death. Jones v. Insurance Co., 117 N. Y. 103, 22 N. E. 578. Without prolonging this opinion by the citation of further authorities, our conclusion is that the judgment must be reversed. Judgment reversed and new trial awarded.

See Hohn v. Inter-State Casualty Co., 115 Mich. 79, 72 N. W. 1105.

TRAVELERS' INS. CO. of HARTFORD v. MELICK.

Circuit Court of Appeals, Eighth Circuit. December 3, 1894. No. 482. 65 Fed. 178.

Effect of Statements in Proofs of Loss.

In Error to the Circuit Court of the United States for the District of Nebraska.

This was an action by Samuel M. Melick, as administrator of the estate of Leonard H. Robbins, deceased, against the Travelers' Insurance Company, of Hartford, upon a policy of insurance. Upon the trial in the circuit court, a verdict was rendered for the plaintiff. Defendant brings error.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Sanborn, Circuit Judge. The first question in this case is whether or not the court below should have instructed the jury to return a verdict in favor of the plaintiff in error. The Travelers' Insurance Company of Hartford, Conn., the plaintiff in error, insured, by its written policy, Dr. Leonard H. Robbins, a physician of Lincoln, Neb., for a term of one year, against death that should result from "bodily injuries

effected during the term of this insurance, through external, violent, and accidental means alone, * * * independently of all other causes." The policy provided that:

"This insurance does not cover disappearances; nor suicide, sane or insane; * * * nor accident, nor death, * * * resulting wholly or partly * * * from * * * disease or bodily infirmity, hernia, fits, vertigo, sleepwalking, * * * intentional injuries (inflicted by the insured or any other person)."

Samuel M. Melick, the defendant in error, as administrator of the doctor's estate, brought this action on the policy, and recovered a judgment in the court below. In his petition the administrator alleged that the doctor died June 18, 1890, and that his death was caused by an accidental shot wound in his foot, which he inflicted upon himself June 1, 1890. The answer denied this allegation, and alleged that his death was caused by his cutting his own throat with a scalpel, and that it resulted from intentional self-inflicted injury. The reply denied these allegations of the answer.

There was evidence that the doctor accidentally sent a bullet through the fleshy portion of his foot, June 1, 1890; that the wound thus caused became very painful, confined him to his bed, caused a fever, and gradually reduced his strength, until he died, June 18, 1890; that this gunshot wound was just such an injury as would naturally produce tetanus or lockjaw; that the doctor and his physicians feared that disease from the first, and that they used chloral and chloroform to relieve the pain and ward off this disease; that in the early morning of June 18, 1890, while the deceased was alone in his room, he was seized with tetanus; that this disease causes the most excruciating pains that human beings ever suffer; that it is fatal in a vast majority of cases; that it produces spasms or convulsions, and sometimes causes death by a spasm of the larynx, which prevents the passage of air through the trachea to or from the lungs; that the doctor was found dead in his bed, June 18, 1890, with a scalpel in his right hand, and his trachea and both his jugular veins cut; that the tetanus was sufficient to produce the death, and the throat-cutting was sufficient to produce it.

The administrator, who was not a physician, stated in his proofs of loss that the insured "took a knife and cut his throat; all evidence shows that the conditions of his mind and his physical condition that prompted the suicide was caused by the shot wound"; and he testified that he thought the loss of blood from the cut produced the death, but he could not say positively. On the other hand, Dr. Shoemaker, who was the attending physician, testified that tetanus was the only cause that he should attribute the death to in this case; and Dr. Hatch, another physician, in answer to an inquiry for his opinion, said:

"Well, there was conclusive evidence that the man was in the embrace of tetanic spasms. It is impossible for mortal to tell, and no one but the recording angel will be able to tell. He was in the embrace of tetanic spasms. I think both. I think tetanic spasms and the cut,—the two were present when breath left the body."

Under this state of the evidence, it is assigned as error that the court below refused to instruct the jury to return a verdict for the insurance company; and it is contended that the question whether the shot wound which caused the tetanus, or the throat cutting, was the proximate cause of the death, was a question of law for the court.

In Railway Co. v. Kellogg, 94 U. S. 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

This opinion of the supreme court is a complete answer to the contention of the plaintiff in error here. Railway Co. v. Callaghan, 6 C. C. A. 205, 208, 56 Fed. 988.

It is urged that this question was for the court, and that the court was bound to declare that the cutting was the proximate efficient cause of the death in this case, because the evidence was uncontradicted that the cutting was later in time than the shot wound, and was sufficient to cause the death. This position might be maintained if the cutting was not itself produced by the shot wound, and if the evidence was uncontradicted that the death would not have occurred as soon from the tetanus in the absence of the cutting. But the argument begs the primary question in the case,—whether the cutting was a cause of the death at all. If it neither caused nor hastened the death of the insured, then it was in no sense a cause of it; and, however new or sufficient it may have been to have caused it, it could not relieve the insurance company from a death whose sole cause was the accidental injury. This question was peculiarly one of fact, The insurance company had agreed to pay the promised indemnity for any death that resulted from the accidental shot wound alone. The question was, what did in fact cause the death,—the shot wound, the cutting, or both? Nor would this case be withdrawn from the effect of this rule if the evidence upon this question was undisputed, for the question is always for the jury where a given state of facts is such that reasonable men may fairly differ upon it. It is only when all reasonable men, fairly exercising their judgments, must draw the same conclusion from an admitted state of facts, that it becomes the duty of the court to withdraw a question of fact from the jury. Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Railway Co. v. Jarvi, 10 U. S. App. 439, 450, 451, 3 C. C. A. 433, 437, 438, and 53 Fed. 65; Fuel Co. v. Danielson, 12 U. S. App. 688, 6 C. C. A. 636, and 57 Fed. 915; Railroad Co. v. Kelley's Adm'rs, 10 U. S. App. 537, 544, 3 C. C. A. 589, 593, and 53 Fed. 459; Railway Co. v. Ellis, 10 U. S. App. 640, 644, 4 C. C. A. 454, 456, and 54 Fed. 481. But the evidence in this case was not undisputed. One witness testified that he thought the cutting was the cause of the death, another that tetanus was, and a third that it was both. It was at least doubtful what answer ought to be given to the question upon the evidence. It was by no

means clear that no reasonable man could fairly draw the conclusion that the shot wound, and not the cutting, was the cause of the death; and the request to withdraw the case from the jury was properly denied.

A special verdict was rendered by the jury, and it is assigned as error that the court below rendered judgment thereon for the defendant in error. Before entering upon the discussion of this assignment, let us consider what findings were necessary to sustain the claims of the respective parties to this litigation. The administrator had alleged that the shot wound was the cause of the death, and the burden of proof was upon him to establish that fact. The insurance company had denied this averment, and had alleged that the death was caused by the suicidal throat cutting; and the administrator had denied this allegation. That the death was caused by suicide, or self-inflicted injuries, or resulted from any of the excepted causes named in the policy, was matter of defense, and the burden of proof was upon the insurance company to establish it. Again, where it is doubtful from the facts of a case whether a death was caused by accidental injuries or by the suicidal act of the deceased, a presumption of law arises that the accident, and not the suicidal act, was the cause. Mallory v. Insurance Co., 47 N. Y. 52; Cronkhite v. Insurance Co. (Wis.) 43 N. W. 731, 732; Insurance Co. v. McConkey, 127 U. S. 661, 667, 8 Sup. Ct. 1360.

The only finding, then, requisite to sustain the administrator's case here was that the shot wound caused the death. It was not incumbent upon him to obtain a finding that the cut pleaded by the insurance company did not cause it; that was the necessary legal effect of a finding that the shot wound did cause it, in the absence of any further finding as to the cause of the death. On the other hand, it was necessary to the defenses of the insurance company that it should either prevent a finding that the shot wound was the cause of the death, or procure an affirmative finding that it was caused wholly or partly by a suicidal act or intentional self-inflicted injury. In this state of the case, the court submitted to the jury three findings upon this question, and instructed them to return those which stated the facts as they found them. The three proposed findings were:

"(10) We find that the pistol-shot wound received by the said Leonard H. Robbins, on the 1st day of June, 1890, was an accident, and one insured against in said policy of insurance; and that said pistol-shot wound was the proximate cause of the said Leonard H. Robbins' death, on or about the 18th day of June, 1890."

"(8) We find that on or about the 18th day of June, 1890, after being confined to his bed, from the effects of said wound, tetanus or lockjaw had set in, superinduced and caused by said pistol-shot wound; and that the said Leonard H. Robbins, while in a state of frenzy and delirium, and in the agonies of tetanic convulsions, caused by said wound, seized a scalpel, and cut his throat; and that death followed from the two causes combined; but whether or not the said Leonard H. Robbins died from loss of blood resulting from said cut in the throat, or from tetanic convulsions or lockjaw, we, the jury, are unable to determine."

"(18) We find that the wound inflicted by said deceased with a scalpel was a mortal wound, and that the same caused the death of said Robbins."

It will be seen that the tenth finding was that the shot wound was the cause of the death, the eighth was that the shot wound and the throat cutting together caused the death, and the eighteenth was that the throat cutting alone caused it. The jury returned the tenth finding, and rejected the eighth and eighteenth. In effect they thus found that the pistol-shot wound caused the death, and that the cutting neither caused nor assisted to cause it. This was certainly as conclusive of this question as a general verdict for the administrator, and fully authorized the judgment in his favor.

The jury also made the following findings with reference to the cutting of the throat:

"(8) We find that the wound inflicted on the throat of the insured was sufficient to produce death, independent of any and all other causes; and we further find that tetanus, suffered by the insured, superinduced by the pistol-shot wound, was sufficient to produce death, independent of all and any other causes."

"(9) We find that the insured, Leonard H. Robbins, cut his

own throat with a scalpel, to end great and excruciating pains which he, the said Robbins, was then suffering from the effects of the pistol-shot wound in his foot."

"(11) We find that the cutting of his throat by Leonard H. Robbins was an act caused by physical pain and suffering, which he was unable to resist or control, resulting from the wound in the foot; whether voluntary or involuntary, we, the jury, are unable to decide."

It is said that the ninth finding—that the insured cut his own throat with a scalpel, to end great and excruciating pains—is a finding of intentional self-destruction, and is a bar to any judgment for the administrator under the clause of the policy which excepts death by suicide. It is a conclusive answer to this proposition that the jury refused to find that the cutting either caused or contributed to the death, and did find that the shot wound caused it; hence whether the cutting was intentional or unintentional becomes immaterial, since it had no part, according to this verdict, in producing the death.

The exception to the action of the court in rendering judgment upon the findings of the jury cannot be sustained.

The objection that the findings of the jury are contrary to the weight of the evidence cannot be considered by this court. In an action at law, this is a court for the correction of the errors of law of the court below only. There was, as we have already held, sufficient evidence to warrant the submission of the question of proximate cause to the jury in this case. The court below committed no error in weighing this evidence; that duty was performed by the jury, and not by the court; and hence there is no ruling of the court in that regard for us to review, and it is not our province to review and correct the findings of the jury on questions of fact properly submitted to them. Railway Co. v. Ellis, 4, C. C. A. 454, 456, 54 Fed. 481; City of Lincoln v. Sun Vapor Street-Light Co., 8 C. C. A. 253, 257, 258, 59 Fed. 756.

The conclusions we have thus reached upon the evidence and the findings of the jury render it unnecessary to consider in this case the vexed question, exhaustively discussed in the briefs of counsel, whether the throat cutting was suici-

dal or accidental, with the intent of self-destruction or with the intent to cure or mitigate a mortal malady.

It is assigned as error that the court charged the jury, in effect, that if they found that the pistol-shot wound was an accident, that the wound caused tetanus, great bodily pain, and delirium or fever, and while in that state of fever and delirium, the insured cut his own throat, being impelled thereto by the intense agony caused by said wound, which the deceased was unable to resist or overcome, then the shot wound might be considered a proximate cause of this injury; and that if, in a period of delirium or a state of frenzy, uncontrollable because of the great pain and bodily suffering caused by the lockjaw that was produced by the shot wound, he cut his own throat with a scalpel, from the direct effects of which he died, they might, notwithstanding, find that the proximate cause of the death was the pistol-shot wound accidentally received in the foot. If this charge was erroneous, it is difficult to see how the plaintiff in error could have been prejudiced by it, in view of the refusal of the jury to sustain by their findings its defense that the cutting either caused or contributed to cause the death. As, however, the claim is strenuously urged that it must have influenced the jury, we proceed to consider it. The criticism made of this charge was that the pistol-shot wound was too remote from the cutting and the death to be considered as the moving cause of either, and that the court should have told the jury that it must appear from the evidence that the cutting of the deceased's throat was the natural and probable consequence of the shot in the foot, and ought to have been foreseen in the light of attending circumstances, and that it must appear that the death naturally followed from the shot wound, without the intervention of some act of the deceased not reasonably to be expected, before they could find that the shot wound was the proximate cause of the death. The question whether or not the court ought to have given to the jury the general rules of law on the subject of proximate cause embodied in this criticism is not before this court, because the plaintiff in error did not request the court below to give them; they were merely urged arguendo in the exceptions to the charge. The only

question here is whether, in the state of the case set forth in this instruction the pistol-shot wound was so remote from the injury inflicted by the cutting and the death that it could not be found to be their efficient or moving cause. The proximate cause has been so lately defined and the rules for its discovery so fully stated by this court that it is only necessary to refer to Railway Co. v. Elliott, 5 C. C. A. 347, 55 Fed. 949; Railway Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988; and Railway Co. v. Moseley, 6 C. C. A. 641, 57 Fed. 921, for our views of the law upon this subject. In the last case we said that:

"The proximate cause is not always, nor generally, the act or omission nearest in time or place to the effect it produces. In the sequence of events, there are often many remote or incidental causes nearer in point of time and place to the effect than the efficient moving cause, and yet subordinate to it, and often themselves influenced, if not produced by it." Page 925, 57 Fed., and page 641, 6 C. C. A.

And in Railway Co. v. Elliott, supra, we said:

"Obviously, the relations of causes to their effects differ so widely, and are so various, that no fixed line can be drawn that will in each case divide the proximate from the remote cause. The best that can be done is to carefully apply the rule of law to the circumstances of each case, as it arises." Page 952, 55 Fed., and page 347, 5 C. C. A.

The question presented by this instruction is, like most questions involving this doctrine of proximate cause, perplexing and difficult; but after as careful a consideration as we are able to give to the supposed case stated in this instruction, in the light of the authorities and the exhaustive arguments presented by counsel, we are unwilling to say that the wound in the foot might not have been the efficient cause of the death under the facts and circumstances there set forth. It must be borne in mind that the doctrine of proximate cause has a different relation to an action for negligence from that which it bears to a contract to indemnify for the result of a given cause. In the former it measures the liability, while in the latter the contract fixes the extent of the liability. In an action for negligence the liability extends only to the natural

and probable consequences of the negligent act. In the case in hand the contract is to indemnify the insured against death that shall result within 90 days from accidental bodily injuries alone. The company was undoubtedly liable under this contract for the death of the insured if that death did in fact result from the accidental shot wound alone. The crucial question was whether or not it did in fact so result, and the doctrine of proximate cause was applicable to this case only to aid in finding a just answer to this question, and not to measure the liability which the contract had fixed.

The authority chiefly relied on to sustain the exception to this instruction is Scheffer v. Railroad Co., 105 U. S. 249. That was an action for negligence. The plaintiff was injured in a railroad wreck. The complaint alleged that the injury caused phantasms, illusions, and forebodings, which eventually prostrated the reasoning powers of the assured, and caused him to take his own life eight months after the injury. The supreme court declared that the original injury was too remote to be deemed the proximate cause of the death, and that the act of self-destruction was a new interventing cause which must be held responsible for it. But it is far from following from this decision that if the railroad company had contracted to indemnify Mr. Scheffer against a death that resulted from that wreck, and the injury there received had confined him to his bed, had worn and exhausted him with pain, and then caused an agony of delirium and fever that irresistibly impelled him to take his own life only 18 days after the injury, that court or any court would have declared the injury too remote to be deemed the efficient cause of the death. So, in Streeter v. Society, 65 Mich. 199, 31 N. W. 779, cited by counsel, where the insured received an injury at the base of his brain from a fall on the sidewalk, complained of pains in his head, changed his demeanor, and after six weeks shot himself at a time when some of the witnesses testified that he was unable to control his physical actions, the court held that the fall was too remote and unconnected with the act of self-destruction to stand as its moving cause. But it is unprofitable to review the cases. In these and other cases cited for plaintiff in error the original negligence or accident is so much

further removed, so much more disconnected, from the fatal effect than the shot wound in this case is from the cutting, that they form no criterion for its determination.

In the case in hand the original cause is near in time,—only eighteen days from the fatal effect; while in the Scheffer Case it was eight months, and in the Streeter case six weeks, from it. In this case the sequence of events is neither unnatural nor improbable, and the chain of causation seems to us unbroken. It was not unnatural nor improbable that the shot wound in the foot should produce great pain and fever. It was not unnatural nor improbable that it should produce tetanus, and that tetanus should produce uncontrollable pain, fever, and delirium. It was neither unnatural nor improbable that a man in the torture of uncontrollable agony and in a delirium or fever should be irresistibly impelled to do himself an injury in an attempt to abate his suffering, or that, if he was a physician, and familiar with the use of a scalpel, near at hand, he should seize and use that to relieve his pain. The universal practice of providing such sufferers with constant attendants, in order to prevent just such accidents, is convincing proof that this was neither an unnatural nor an improbable consequence of the excruciating torture of the lockjaw that the shot wound produced. We are forced to the conclusion that, if the jury found the facts as stated in this instruction, they might well find that the shot wound was the efficient cause which set in motion the train of events that in their natural sequence produced the cutting and the death,—the causa causans without which neither would have been. But it is said that this view is erroneous, because the cutting was a new and sufficient cause of the death, which intervened between the shot wound and the fatal result, and thus became itself its proximate cause. This position is untenable, because in the state of facts set forth in this instruction the cutting was not a new cause, nor a cause independent of the original efficient cause,—the shot wound. It was only an effect of that cause,—an incidental means produced and used by the original moving cause to produce its fatal effect. In the absence of the shot wound the cutting would never have been. That was dependent entirely for its existence and for its effect upon the original accident, and

was a mere link in the chain of causation between that and the death. The intervening cause that will prevent a recovery for a death which results from an accidental bodily injury indemnified against by contract must be a new and independent cause, which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original accidental injury, and produces a different result, that could not reasonably be anticipated. It may not be a mere effect of that injury, produced by it, and dependent upon it for both its existence and its effect. Railway Co. v. Callaghan, 6 C. C. A. 205, 56 Fed. 988, 994; Railway Co. v. Kellogg, 94 U. S. 469, 475. If the jury found that the facts were as they were stated in this instruction, the cutting was neither a new cause nor a cause independent of the shot wound, but a mere effect of it. Therefore, it could not have been the proximate or moving cause of the death.

For the reasons already given in the affirmance of the instruction we have been considering, there was no error in the refusal of the court to give the counter instruction requested by counsel for the plaintiff in error, to the effect that the jury could not find that the wound inflicted by the scalpel was caused by the shot wound, and that, if they found the wound inflicted with the scalpel was a mortal wound, they could not find that the shot wound was a cause of the death.

Complaint is made that the court below refused to give four elaborate instructions upon the burden of proof, requested by counsel for plaintiff in error. But in its charge the court told the jury that, to entitle the plaintiff to recover, it was necessary for them to find from the evidence that the death of the assured was proximately caused by such an accident as was covered by the terms of the policy; that it was the duty of the defendant in error to establish, by a preponderance of proof, the truth of every affirmative proposition which it was necessary for him to show, in order to justify a recovery; and that they could not base any of their findings upon conjecture. In view of the fact that the court submitted the crucial questions in the case—whether or not the shot wound was the proximate cause of the death, and whether or not the cutting of the throat either caused or contributed to the death—

to the jury by special proposed findings on these questions, in accordance with the respective claims of the parties in their pleadings, we are persuaded that there was no error in the refusal of the court to charge more at length upon the burden of proof. The rule of law was fairly stated, and, where this is done in the general charge, there is no error in a refusal to give instructions upon the same subject requested by counsel. Railway Co. v. Jarvi, 10 U. S. App. 439, 453, 3 C. C. A. 433, 439, and 53 Fed. 65; Railroad Co. v. Washington, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347.

It is assigned as error that the court instructed the jury with reference to the statements in the proof of loss that "the deceased, Leonard H. Robbins, took a knife, and cut his throat. All evidence shows that the condition of his mind and his physical condition, that prompted the suicide, was caused by the shot wound,"—that they were at liberty, in determining the cause of death, to consider this statement of the defendant in error, but that it was not in any manner conclusive upon him; that they should only give to it such weight as they thought it might be entitled to receive; that, whatever cause of death might have been alleged in the proof of death, he was at liberty, on the trial, to show that the death resulted from some other or different cause; and that, in determining the cause of death, they should be governed by all the evidence that had been introduced upon that question. The better rule upon this subject is that statements of this nature in proofs of loss are binding and conclusive upon the party who makes them until, by pleading or otherwise, he gives the insurance company reasonable notice that he was mistaken in his statement, and that he will endeavor to show that the death was the result of a different cause from that stated in his proofs. After the insurance company has received due notice of this fact, the proofs have the probative force of solemn admissions under oath against interest, but they are not conclusive. Insurance Co. v. Newton, 22 Wall. 32; Keels v. Association, 29 Fed. 198, 201; McMaster v. Insurance Co., 55 N. Y. 222, 228, 233; Parmelee v. Insurance Co., 54 N. Y. 193. There was nothing in the charge of the court in conflict with this rule. Ample notice of the claim

of the defendant in error that the death was not caused by suicide was given in the pleadings, and the proof itself disclosed the claim that the cutting was an effect of the accidental shot wound. The court, it is true, declared that this statement was not in any manner conclusive; but, if it was conclusive, it was conclusive in every manner. The court told the jury that they should only give it such weight as they thought it was entitled to receive; but there was no error in this, for the presumption is that they thought it was entitled to receive its lawful probative force. The fact is that there is no positive error in the charge the court gave here. The real complaint of counsel is that the court did not also charge the jury that the weight which they should give to the statement was that of a solemn admission under oath against interest. Undoubtedly, the court would have so charged if its attention had been called to it, and it had been requested so to do. It was not. The question was not presented to it, and was not ruled upon, and cannot now be successfully urged upon our consideration.

Finally, it is insisted that the court erred in directing the jury to find the special verdict. Upon an examination of the record, however, we discover that no objection to this course of proceeding was made at the trial. On the other hand, counsel for the plaintiff in error requested the court to submit four special questions to the jury, and his only exceptions relative to this subject were to the refusal of the court to submit his questions, and to the statement of facts in certain of the proposed findings it did submit. The court below, therefore, was not called upon to rule upon this question, and there is no ruling here for us to review.

The judgment below must be affirmed, with costs; and it is so ordered.

See Cochran v. Mutual Life Ins. Co., 79 Fed. 46; Insurance Co. v. Newton, 22 Wall. (U. S.) 32; Keels v. Mutual Reserve Fund Life Ass'n, 29 Fed. 198; McMaster v. Insurance Co. of North America, 55 N. Y. 222; Parmlee v. Hoffman Fire Ins. Co., 54 N. Y. 193.

PHOENIX INS. CO. OF BROOKLYN v. RAD BILA HORA C. S. P. S.

Supreme Court of Nebraska. June 5, 1894. 41 Neb. 21.

Proofs of Loss.

Irvine, C. This was an action upon a policy of insurance written upon a building owned by the defendant in error, and occupied by it as a lodge room. There was a verdict and judgment in the district court against the insurance company, from which it prosecutes error.

A number of the rulings of the court in relation to the admission of evidence are complained of. Mr. Schmidt, being upon the stand, testified that he was the secretary of the plaintiff association; that the lodge had a charter issued by the Grand Lodge of the state; that it derived its authority from this charter; that the charter was destroyed in the fire. He was then asked to state what this charter was. This question was objected to as incompetent, immaterial, and calling for secondary evidence upon an insufficient foundation. If the evidence was material, it was certainly competent. We cannot imagine a more satisfactory foundation for secondary evidence than proof that the primary evidence had been totally destroyed. We presume the object of this testimony was to show the organization of the plaintiff, and establish its capacity to sue. The petition does not allege the nature of the plaintiff's organization,—whether a corporation or a voluntary association,—but no objection was taken, either by demurrer or answer, to the plaintiff's capacity to sue; and, by sections 94 and 96 of the Code of Civil Procedure, any objection upon that ground was therefore waived. Indeed, the insurance company expressly admitted in its answer the issuance of the policy to the plaintiff,— that is, a contract with the plaintiff,— and we cannot see how, under the issues, it was material to prove plaintiff's character as an association or corporation. The objection for immateriality should have been sustained, but the error was of such a character that it was clearly not prejudical.

The answer denied plaintiff's ownership of the land upon which the building stood. In order to prove ownership, plaintiff called Mr. Tikalsky, who testified that he had sold the land to the plaintiff, made a deed to the plaintiff of the land in 1886; that this deed was burned with the building. He then testified that, after the fire, another deed was executed to the plaintiff. This deed was then offered in evidence, and its admission is urged as error. The deed itself recites that it was executed to take the place of a former deed, which had been destroyed by fire in the society hall. It was not necessary to offer the deed, as, upon the proof made, secondary evidence might have been given, and to a certain extent was given, of the contents of the original deed; but this deed, being in the nature of a further assurance, had effect by relation to the original conveyance, and it was competent and material in support of the issues as to plaintiff's ownership.

It appeared in evidence that there had been some negotiations in regard to the loss between plaintiff's secretary and three individuals, whose authority to act for the insurance company the plaintiff had considerable difficulty in establishing. There is a long list of assignments of error in relation to evidence in regard to the authority of these men, and in regard to transactions with them. To discuss each assignment would unreasonably extend this opinion, and there are no questions of law presented of sufficient importance to warrant such a detailed discussion.

There was no doubt of the authority of the agent to issue the policy. Its issuance and the payment of premiums were expressly admitted. The defense was twofold: First, that the plaintiff had not made proper proofs of loss; and, secondly, that the action was not begun within six months, as the policy required. The legal aspects of these defenses will be hereafter considered. It was proved by Kamansky himself that he was a local agent for the company, with authority to take applications, and some authority at least to collect premiums. Immediately after the fire, the plaintiff's secretary gave to him oral notice of the fire, and requested him to communicate with the company, which he at once did. Counsel conceive that the plaintiff was endeavoring to establish a waiver by Kaman-

sky of the requirements as to proof of loss, and that no authority to do so was shown; but, for plaintiff's real purpose, Kamansky's authority was immaterial. What notice or proof of loss was required will be considered later. If the notice given to the general agent in Chicago by Kamansky was sufficient notice, it was entirely immaterial what Kamansky's authority as agent was, or whether he had any authority. If he was not the company's agent, by complying with the plaintiff's demand, and notifying the proper officer of the company, he constituted himself the plaintiff's agent to give the notice. If the case rested upon any waiver by Kamansky, we would agree with the defendant that no authority was shown in him; but the question was not whether Kamansky had waived proof of loss, but whether notice of loss had been given the Chicago office, and whether that notice was sufficient. This notice did not have to be given through the company's agent, but might be given by the plaintiff, or by any one delegated by the plaintiff for that purpose.

The plaintiff was endeavoring to meet the other defense by showing that the company lulled defendant into a sense of security by negotiations and proposals until the six months allowed by the policy for bringing suit had expired. These negotiations were carried on by Kamansky, Williams, and Wyman. Without any regard to declarations made by any of these men, there is ample evidence to show that all of them sustained some relation of agency to the company; that they habitually acted for it in the examination and adjustment of losses, and their acts were recognized by the company. If the special limitation in the policy was valid, and if the negotiations and proposals during that period excused the plaintiff from earlier beginning this suit, we think there was ample to charge the company with the consequences of the acts of these men in that behalf.

Coming now to the assignments of error relating to the instructions, we will consider, first, the law as applicable to this case in regard to notice or proofs of loss. On this subject the court gave the folllowing instructions: "And, upon the issues found, it devolves upon the plaintiff to prove, by a preponderance of the evidence, its ownership of the property insured,

and the destruction of the same by fire, as alleged, and the value of said property at the time of its destruction; and that the plaintiff, immediately after such loss, notified the said company, or its adjusting agent, of the destruction of said property, or that the plaintiff gave defendant notice of such loss, although not in exact conformity with the requirement of said policy; and that the notice was received by the company without objection, and without suggesting that it did not conform to the terms of the said policy. In such case defendant will be deemed to have waived other or further proof of the said loss." The defendant requested a peremptory instruction to find for the defendant, because there was no evidence that proofs of loss had been made. The policy in evidence is very simple in its requirements. The following are the only provisions as to notice or proofs of loss: "The Phoenix Insurance Company hereby agrees to make good unto the insured, their executors, administrators, or assigns, upon receipt of proper proofs at its Chicago office, all such immediate loss," etc.; also, "in case of loss or damage, the insured shall forthwith give notice of such loss in writing to the company." It will be observed that the policy does not specify in what form the proofs or notice shall be given, except that the notice shall be in writing. The evidence shows that upon request of plaintiff's secretary, Kamansky did notify, in writing, the Chicago office, and that thereafter a person, who Kamansky testifies was the adjuster, appeared upon the scene, and negotiations in regard to the loss were had. It does not appear that objections were ever made that the notice was insufficient, or that the plaintiff was ever called upon for other or further proofs. In Insurance Co. v. Lippold, 3 Neb. 391, it was said that the clauses in a policy as to preliminary proofs and notice should always be construed with great liberality, and that, if objection is made by the company to the form of proof of loss, it is its duty to notify the party of the alleged defect, and, failing to do so, it will be deemed waived. In Insurance Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, the policy did not require written notice, and it was held that under such a policy, where agents of the company were present at the fire, and agreed to give notice to the company, and soon

thereafter an adjuster appeared, this was sufficient. In Insurance Co. v. Barwick, 36 Neb. 223, 54 N. W. 519, it is repeated that, if objection is made to the form of the proof, it should be communicated to the insured, and he should be required to make out a full statement, otherwise the objection will be unavailing; that if a company has notice from its own agent that a loss has occurred, and it sends an adjuster to estimate the amount, that constitutes a waiver. These authorities are all applicable to the case under consideration. There being no requirement as to the nature of the proof or notice, and notice in writing having been given by the authority of the plaintiff, and the adjuster having appeared in response thereto, this was a sufficient compliance with the policy, no objections having been communicated to the insured, and no further proofs or information having been requested.

It is said that no waiver is pleaded. The amended petition pleads a performance of "all the conditions of said policy of insurance, except final proof of loss, which was waived by the defendant." It is charged by plaintiff in error that the last clause was not in the petition when the case was tried, and a passage near the close of the bill of exceptions tends to corroborate this statement. We place the decision rather upon the ground that the terms had been complied with than that there had been a waiver; but, if the case was one of waiver, we would have to accept the transcript of the record, authenticated by the clerk's certificate, as conclusive evidence of the contents of the pleadings, and could not permit this evidence to be impeached, either by statements of counsel or by colloquies in the bill of exceptions between counsel and the trial judge. It is true that there is a clause in this policy denying to agents the power to waive any of its terms or conditions, except in the case of the general agent at Chicago, who is only empowered to waive conditions by writing. This is not such a case as that of Insurance Co. v. Heiduk, 30 Neb. 288, 46 N. W. 481, where such a provision was enforced. There is a distinction between waiving the terms of a policy and accepting and acting upon an attempted performance of such terms in such a manner as to adopt such attempts as a compliance. Probably no special agent could

orally waive the requirement as to notice of loss, but the company itself, acting through an agent of general authority or one of special authority in that regard, might, and in this case did, accept what was done as sufficient, and estop itself from requiring anything further.

The limitation clause in the policy was as follows: "No suit or action against this company shall be sustainable in any court of law or chancery unless commenced within six months next after such loss shall occur, any statute of limitations to the contrary notwithstanding." A respectable line of authorities is to be found in support of the validity of similar provisions. There have been at least two cases in this court whose language indicates that such provisions, under certain conditions, are enforceable. Barnes v. McMurtry, 29 Neb. 178, 45 N. W. 285; Insurance Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711. In no case, however, has effect been given to such a provision in this state. Notwithstanding the authorities upon the subject, the writer would hesitate to commit himself to the view that the parties to a contract may bind the courts to a period of limitations other than that prescribed by statute. That question is not, however, necessarily in this case. The court instructed the jury upon the subject as follows: "If you find from the evidence that the defendant, by any conduct or statement of its adjusting agent, while attempting to adjust the said loss, did that which was calculated to induce a reasonable belief in the plaintiff that the claim would be paid without suit, and that the plaintiff was reasonably induced by such conduct of defendant and proposition to settlement to withhold bringing suit until after six months after said loss, then defendant will be deemed to have waived the right to insist upon requiring such suit to be brought within six months from the date of the loss." The evidence fairly tended to support this instruction. Persons undoubtedly authorized to represent the company to some extent and for some purposes in the adjustment of the loss were shown to have conducted negotiations and made proposals for settlement until after the expiration of six months. We have no doubt that, if such a provision is of any validity, the company may, by its conduct, estop itself from claiming

the benefit thereof; and that when the company, by holding out prospects of an amicable settlement, induces the plaintiff to forbear suit until after the expiration of the time limited, the company is hereby estopped from claiming the benefit of the special limitation. Thompson v. Insurance Co., 136 U. S. 287, 10 Sup. Ct. 1019; Steel v. Insurance Co., 47 Fed. 863; Martin v. Insurance Co., 44 N. J. Law, 485; Ripley v. Insurance Co., 30 N. Y. 136; Blanks v. Insurance Co., 36 La. Ann. 599; Insurance Co. v. McGregor, 63 Tex. 399; Bish v. Insurance Co., 69 Iowa, 184, 28 N. W. 553; Insurance Co. v. Myer, 93 Ill. 271. All of the cases above cited fully recognize the principle and sustain the instruction given by the trial court. Some of them hold that, under the facts of the cases under consideration, there was no estoppel; but those cases were either where there was a denial of liability accompanying an offer to compromise, or cases where there was distinct denial of liability, following negotiations for a settlement, and within such a period that there was a reasonable time after such denial to begin the suit before the period of limitations expired.

We can find neither error in the record, nor merit in the defense interposed. Judgment affirmed.

Accord. Helvetia Swiss Fire Ins. Co. v. Edward P. Allis Co., 11 Colo. 264, 53 Pa. 242; Ruthven v. American Fire Ins. Co., 102 Iowa 550, 71 N. W. 574; Huesinkveld v. St. Paul Marine & Fire Ins. Co., 106 Iowa 229, 76 N. W. 696.

VIRGINIA FIRE & MARINE INS. CO. v. HOGUE.

Supreme Court of Appeals of Virginia. June 14, 1906.
105 Va. 355.

False Swearing in Proofs.

Cardwell, J. Helen M. Hogue, wife of R. F. Hogue, brought this action against the Virginia Fire & Marine Insurance Company upon two policies of insurance, insuring the

plaintiff against loss by fire on "400 bags of Spanish peanuts (1,700 bushels) contained in the frame, shingle roof storage house, situated about 200 yards east of dwelling occupied by assured, about two miles from Disputanta Station in Templeton district, Prince George County, Va. Three-quarter value and lightning clauses attached." The one policy for $1,075 is dated July 13, 1904, the other for $275 is dated March 31, 1904, and each running one year from date.

The declaration alleges that a fire, which occurred on the 29th day of October, 1904, entirely destroyed the storage house mentioned in the policies, together with 400 bags (1,700 bushels) of Spanish peanuts therein stored, of the value of $1,530, and that by reason of this loss the plaintiff was entitled to recover of the defendant company three-fourths of the loss, viz.: The sum of $1,147.50, with interest thereon from January 20, 1905.

The defendant pleaded the general issue, and tendered four special pleas, upon which the plaintiff took issue, the special pleas setting forth specifically instances of fraud and false swearing on the part of the plaintiff in furnishing proofs of loss, including a deposition given by her as to her loss, and claiming that by reason of the alleged fraud and false swearing the defendant was, under a certain clause of its policies, relieved from the payment of anything whatsoever to the plaintiff. The material matters put in issue by the special pleas were, as to the size of the house burned and the amount and value of the peanuts alleged to have been stored therein at the time of the fire, the defendant claiming that in point of fact the room in question was too small to accommodate 400 bags of peanuts, each containing four bushels and a peck, and that, at any rate, at the time of the fire the amount of peanuts in the room burned fell far short of 400 bags.

Upon a trial of the cause, the jury found a verdict in favor of the plaintiff for the sum of $1,145.50, with interest, as claimed in her declaration, and the court, overruling the defendant's motion to set aside the verdict and grant a new trial for misdirection of the jury by the instructions given and refused and because the verdict is contrary to the weight of the evidence, entered judgment in accordance with the verdict;

and to that judgment a writ of error was allowed by a judge of this court.

At the trial the parties each asked the court for certain instructions to the jury, all of which were refused, and in lieu thereof the court gave its own instructions, 10 in number.

In the policies sued on there is a provision to the effect that the entire policy should become void, "if any false swearing, or fraud, or attempt at fraud is made by the assured, before or after loss or damage, in support of his claim for loss, or in the proofs of loss hereinafter mentioned, or otherwise in connection with this policy or any claim under it." There was evidence tending to prove that the defendant in error had violated this provision of her policies, and therefor had forfeited all right to recover thereon, by false swearing in furnishing proofs of her loss and in a deposition given by her as to the loss, and plaintiff in error, by its instructions Nos. 4 and 5, sought to have the jury told that the degree of proof required to establish the fraud or false swearing alleged was merely a "preponderance of evidence," but the court refused these instructions and gave in lieu thereof its own instructions Nos. 8 and 9, which in effect told the jury that the burden of proving the fraud and false swearing set up in the special pleas was upon the party alleging the fraud and false swearing, and that the fraud must be established by "clear and satisfactory proof."

Instructions Nos. 4 and 5 refused, and Nos. 8 and 9 given, are as follows:

No. 4: "The court instructs the jury that in considering whether Mrs. Hogue or her husband, in establishing Mrs. Hogue's loss by the fire of October 29, 1904, swore falsely or untruely, the falsity or untruth of their statements need not be established with that nicety of precision and to the exclusion of every reasonable doubt of their innocence as would be necessary, were they, or either of them, on trial and being prosecuted criminally for perjury, but has to be established like any other fact in issue in this case by a preponderance of testimony."

No. 5: "The court instructs the jury that this being a civil suit, they must decide every material issue according to the

preponderance of the evidence, whether such evidence be written, oral, or circumstantial, and, in determining the weight to be given to the oral evidence, they are not to decide either way solely by the number of witnesses testifying to any fact or facts, but they are the exclusive judges of the credibility of each and every witness, and of the weight to be given to the testimony of such witness, taking into consideration all the surrounding circumstances on the trial, including the interest of such witness in the result of the trial."

No. 8: "But the burden of proving fraud or false swearing, by which the defendant seeks to avoid all liability for the alleged loss, is upon the defendant."

No. 9: "The law never presumes fraud, but the presumption is always in favor of fair dealing. He who alleges fraud must establish it, and by clear and satisfactory proof. It is not necessary that fraud shall be proved by direct and positive proof, but it may be shown by circumstances. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof that the law requires."

The contention of plaintiff in error is that the well-settled rule as to the degree of proof required to establish fraud does not apply to a case where an insurer sets up the defense to an action on its policy that assured has forfeited all right to recover thereon by fraud or false swearing, but that the fraud or false swearing alleged as a defense to the action should stand, as to the question of proof, on a different footing from fraud alleged in an action brought for the purpose of establishing fraud, and the degree of proof should, if anything, be less.

Recognizing that the strong presumption of both law and fact must always be in favor of freedom from fraud or unfair dealing, the courts have spoken in no mistakable terms as to the degree of proof required to establish fraud or unfair dealing, though the precise question here presented has not been passed upon by this court, so far as we have been able to find.

In Hord's Adm'r v. Colbert, 28 Grat. 49, the opinion by Staples, J., says: "The law does not presume fraud.

It is not to be assumed on doubtful evidence. * * * The party alleging the fraud must clearly and distinctly prove it. If the fraud is not strictly and clearly proved as it is alleged, * * * no relief can be had."

The same rule, as to the degree of proof required to establish fraud is stated and sanctioned in apt words by Harrison, J., in V. C. C. Co. v. Carpenter, 99 Va. 292, 38 S. E. 143, by Keith, P., in Wheby v. Moir, 102 Va. 878, 47 S. E. 1005, and in a great many more cases which might be cited; but, as we have said, none of them deal with the precise question presented in this case.

In 14 A. & E. Ency. L. p. 200, citing a number of authorities, it is said: "According to the overwhelming weight of authority, fraud need not, like the guilt of the accused in a criminal prosecution, be established beyond a reasonable doubt. A preponderance of evidence as in any civil case is sufficient, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit frauds, and reasonably to satisfy the understanding and conscience of the judge or jury. If it does this, it is sufficient both at law and in equity." Again, on pages 203, 204, it is said: "The fact that it appears that a party charged with fraud had a motive for committing it, is not alone sufficient to authorize a finding against him."

The presumption of innocence and fair dealing attends a party charged with an unlawful act or with moral turpitude, whether made in one form of pleading or another, and unless the quality of the proof required to overcome this presumption of innocence and fair dealing be no higher or greater than when the issue does not involve the charge of an unlawful act or the guilt of moral taint, the expressions used by this and all other courts to the effect that fraud must not only be alleged but "clearly and satisfactorily proved" would be meaningless, and we would have the same rule as to the quality of the proof necessary to establish the charge of fraud and false swearing that governs in all civil cases where there is no such issue made. It is true that the rule as to the degree of proof required to convict where the guilt or

innocence of a party charged with a criminal offense is the issue and where the jury is not authorized to find a verdict of conviction unless the guilt of the accused is made to appear "beyond a reasonable doubt," does not apply in a civil case.

So in the case of Blackburn v. St. P. F. & M. Ins. Co. (N. C.) 21 S. E. 922, relied on for plaintiff in error, it was held that instructions which told the jury that the defendant must show the conspiracy between the plaintiffs and another to burn and also the burning of the insured building "beyond a reasonable doubt"; that they must find "that there was no reasonable hypothesis consistent with the innocence of the plaintiffs"; and that it was not sufficient "that the facts and circumstances relied upon to establish the truth of the charge are consistent with it, they must be inconsistent with his innocence"—were erroneous. In that case it is rightly stated that both reason and the weight of authority sustain the proposition that "in an action on a policy of insurance against fire, when the defendant pleads that the property was fraudulently burned by the plaintiff, the defendant is not bound to prove such defense beyond a reasonable doubt."

A number of other authorities are cited for plaintiff in error, among them Bullard v. His Creditors, 56 Cal. 600, 1 Greenleaf on Ev. 161, 4 Field's L. Briefs, and Clements on F. Ins., etc., 286, to the effect that a number of instructions taken as a whole which "conveyed to the mind of the jury the idea that they were not authorized to find fraud by a mere preponderance of evidence," were erroneous; that the plea of arson by the insurer to an action on a policy of fire insurance has to be established only by a preponderance of evidence; and that "willful burning may be established by circumstantial evidence and by a preponderance of evidence, it is not necessary to prove the acts beyond a reasonable doubt as required in a criminal prosecution." But we find nothing in these authorities that is opposed to the rule that where fraud, false swearing, or other unlawful act is charged as a ground for rescinding a contract, or is relied on to relieve a party sued on a contract from liability thereon, the charge, by whatever pleading made, must be established by "clear and satisfactory" proof.

In Va.-Car. Chem. Co. v. Carpenter, supra, the plaintiff charged the defendant with bad faith in refusing to accept certain rock which it had agreed to accept if, upon test, it proved satisfactory, and this court said: "To act in bad faith is to act fraudulently, and as every one has attached to his actions the presumption of innocence, it is an established principle that a charge of fraud or bad faith must be clearly and distinctly proven."

Accordingly it was held in Ware v. B. L. & I. Ass'n, 95 Va. 680, 29 S. E. 744, 64 Am. St. Rep. 826, that the defense of usury involved the charge of a violation of law visited by penalties, and the proof of the usury must be clear and satisfactory.

The term "clear and satisfactory proof," or "clear and convincing proof," used in an instruction in a civil case has been in but a few instances held to mean "proof beyond all reasonable doubt," and does not, as it appears to us, bear that interpretation.

In a case, as in this, where the defense made to the action involves the charge of an unlawful act, fraud, or even bad faith, a preponderance of the evidence, as in any other civil case is sufficient to sustain the charge, provided the proof is clear and strong enough to preponderate over the general and reasonable presumption that men are honest and do not ordinarily commit fraud, or act in bad faith; i. e., the preponderance rule continues to operate in such cases, the adverse presumption in favor of honesty and fair dealing merely requiring more evidence to constitute a preponderance than where this presumption does not exist. As well expressed in the court's instruction No. 9 in this case: "It is not necessary that fraud shall be proved by direct and positive proof, but it may be shown by circumstances. If the facts and circumstances shown in evidence are such as will lead a reasonable man to the conclusion that fraud exists, this is all the proof thereof the laws requires." 17 Cyc. 761-765; Southard v. Curley, 134 N. Y. 148, 31 N. E. 330, 16 L. R. A. 561, 30 Am. St. Rep. 642.

We are of opinion therefore, that "clear and satisfactory proof," in cases involving fraud or false swearing,

may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime, and that the jury in this case could not have been misled to the prejudice of the plaintiff in error by the court's instructions Nos. 8 and 9 complained of. No. 8 correctly propounded the law as to the burden of proof where there is a charge of fraud or false swearing, by which a defendant seeks to avoid all liability under the contract sued on; and No. 9 in plain and unambiguous language instructed the jury as to the character and degree of proof required to establish the charge of fraud and false swearing, and made clear to them what was meant by the term "clear and satisfactory proof," as applied to this case. It follows that we are also of opinion that there was no error in refusing plaintiff in error's instructions Nos. 4 and 5.

It developed in the evidence that the defendant in error was the owner of a farm in Prince George county, on which she resided with her husband and several children; that her husband, R. F. Hogue, attended to all of her business for her, conducted and managed the farm, made and stored the crops, and that she, personally, attended to the indoor work, housekeeping, etc. She was, in the very nature of things, dependent upon her husband for her information and knowledge with respect to the conduct of the farm, and under the circumstances it could not be expected of her to have counted every bag of peanuts raised and stored for her by her husband, as he had entire charge and control of her business in that respect. This was the condition of affairs at the time the fire occurred destroying the peanuts alleged to have been lost, and in giving the two proofs of loss sworn to on November 14 and November 23, 1904, defendant in error stated therein that she had 400 bags, or about 1,700 bushels of Spanish peanuts, of about the value of 90 cents per bushel, making a total value of $1,530, stored in the storehouse on her farm, and that these peanuts were destroyed by the fire of October 29th, without stating whether she knew these facts of her own personal knowledge, or from information derived from others. These proofs were received by plaintiff in error on November 18th and 23d, respectively, and it made no ob-

jection to the sufficiency of either proof of loss as far as the evidence discloses. On December 8, 1904, a special agent of plaintiff in error, accompanied by a contractor also employed by it, both of whom had previously visited defendant in error in connection with her alleged loss, called at her residence in company with a justice of the peace for the purpose of examining her under oath touching her loss. The husband of defendant in error stated at the beginning of this examination that there were some questions asked that probably defendant in error could not answer, and wanted to know if he could answer for her, which was agreed to by the agent of the company, provided she accepted the statements of her husband as if uttering them herself; and defendant in error replying that she would adopt her husband's answers as her own, the deposition was proceeded with. It thus appears that plaintiff in error had then and there, if not before, notice that the answers given by defendant in error were not based upon her own personal knowledge, but to a large extent at least upon information derived from others.

The refusal of the court to give plaintiff in error's first and second instructions is assigned as error. The purpose of these instructions was to tell the jury that defendant in error was responsible for the answers given by her husband to the interrogatories propounded to her on the 8th day of December in support of her claim of loss from the fire which destroyed her peanuts, and that by adopting his answers as her own and swearing to them, any statement that was untrue and false as to her husband would be equally false and untrue as to herself, whereby she could not recover in this action by reason of the provision in the policies which we have quoted above, which provides that the entire policy shall become void "if any false swearing or fraud, or attempt at fraud, is made by the assured before or after loss or damage in support of his claim for loss, or in the proofs of loss hereinafter mentioned," etc.

The vice in these instructions is that they fail to draw the distinction between a mere untrue statement and a fraudulent or false statement.

"It is a general rule that a misstatement in the proofs of

loss, to forfeit the policy, must be not only false but willfully false. A mere innocent mistake will not amount to fraud or false swearing within the provisions of the policy." 4 Cooley's Briefs on Ins. 3415, where a number of cases are cited in support of the text just quoted.

It is not attempted in the evidence to prove that defendant in error willfully and knowingly made false statements in her proofs of loss, nor that she knew that her husband made, in answer to interrogatories, statements that were false. Whether the statements made by the husband were false was a question for the jury, and it would indeed be a hard case if defendant in error were held to have forfeited her right to recover on the policies she held covering the loss for which she is suing, merely because her husband made statements as to her loss which proved to be untrue, although in accepting these statements as her own she believed them to be true.

"Where the property is the business property under the charge and control of the husband as agent of his wife, a fraudulent statement in the proofs by the husband, afterwards adopted by the wife without knowledge of the facts and without investigation, will not amount to fraud on her part." Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743; 4 Cooley's Briefs on Ins. 3417.

In the case just cited it appeared that the husbands of the two ladies whose property had been burned made fraudulent representations and statements in the proofs of loss, and the opinion says: "It is said that the court erred in charging the jury that if there were any fraudulent and wrongful items embraced in the proofs of loss, it must be shown that they were included with the knowledge and by the consent of the ladies insured, and that the fraudulent acts and intent of R. W. Waller, as their agent, could not defeat their right of recovery, unless they knew of the fraud, or ratified it after it came to their knowledge; and that the court should have charged the jury that if Mrs. Scales and Mrs. Waller adopted any false statements made by their agents without investigating the facts, they there became guilty of fraud themselves and the jury should find against them; and that if they made

representation as to knowing the facts when they had no knowledge, and the representations proved to be untrue, that would be fraud within the provisions of the policy and would defeat any recovery. These assignments present the merit of the controversy. * * * As touching this general question it appears that the preliminary proofs were made out by the husbands, Scales and Waller, they were accepted and adopted without investigation by the insured, and were sworn to without actual knowledge on their part, and they were thus rendered to the company. Held, that the instruction given by the court below, as hereinbefore stated, expounded the law correctly, and that the charge requested by the defendant company was rightly refused." Says the opinion further: "Here the business was in the hands of the husbands and they were familiar with it, and the wives were not. The wives could only get the information through their husbands who gave them assurances of good faith by themselves swearing to the statements."

In this case, the agent of the plaintiff in error was informed that the defendant in error was dependent upon her husband for information as to the extent of her loss, and was led to believe that the statements made by her husband and accepted by her, would be received as though made upon her own knowledge; and she was not notified at any time before the trial of this case that plaintiff in error would attempt to hold her responsible for the untruth of the statements made by her husband.

In Metzger v. Manchester Fire Ins. Co., 102 Mich. 334, 63 N. W. 650, a case very similar to the case at bar, and which was cited as authority in Boston Marine Ins. Co. v. Scales, supra, the policy of insurance contained the provision that it should be void in case of any fraud or false swearing by the insured touching any matter relating to the loss, etc. The fraud of the husband was gross and glaring, but the court held that the wife could not be affected by it, inasmuch as she was innocent of the fraud. The opinion in that case, referring to the provision in the policy in which we have mentioned, says: "This defense is not that the company was defrauded in the making of the contract. In such a case the fraud

of the agent could be asserted as a defense against the principal, whether the policy so provided in express terms or not. But the contract was valid, and, for the purpose of determining this question, we must assume that plaintiff has suffered an honest loss, for which she had a legitimate claim. An effort is made to defeat this by showing an attempt by an agent to deceive the defendant into paying a sum greater than the loss. Forfeitures and penalties are not favored in the law, and the language should not be unnecessarily extended by construction. The provision for a forfeiture of rights under the policy is doubtless a wise one, to prevent deceit on the part of insured persons; but it does not seem to us necessary, where the insured acts in good faith, and is not a party to the deceit."

The case of Crump v. Mining Co., 7 Grat. 352, 56 Am. Dec. 116, cited by plaintiff in error in support of its proposition contained in instructions Nos. 1 and 2 refused, has no sort of application to this case. That was a suit brought to recover a stock subscription and the defense of fraud in the procurement of the subscription was made; and it was held that the principal could not recover where the agent had made fraudulent, though unauthorized, representations and the subscriber had been misled to his injury. This principle cannot be extended to a case in which it is sought to enforce a forfeiture because of false swearing as to proofs of loss under a policy of insurance; and no case can be found in which a forfeiture of an insurance policy for fraud and false swearing as to proof of loss was ever effected, unless the defendant swore recklessly and made statements under oath that were knowingly and willfully false. Moral turpitude is an essential element of this species of fraud, and reckless swearing is a moral wrong. Cooley's Briefs on Ins., supra, and authorities there cited.

In lieu of instructions Nos. 1 and 2, asked by plaintiff in error, the court gave its own instruction No. 4, which is as follows:

"If the sworn statements and representations of the plaintiff as to the quantity of peanuts destroyed by the fire, were made by her on information, and not of her own knowledge,

and the defendant company, or its agents acting for it in that respect, understood that they were made merely on information, there is no fraud, if the plaintiff had reason to believe, and did believe, the information upon which she acted to be true, though it proved to be untrue, and the jury should find for her to the extent of the loss sustained by her."

It seems that the only objection made to this instruction is that the court assumes that there was evidence before the jury to the effect that the plaintiff in error, or its agents acting for it, understood that the proofs of loss furnished and deposition given by defendant in error were merely made on information. This objection to the instruction proceeds upon a total misapprehension as to what the evidence in the case is. As we have seen, the agents of plaintiff in error well understood that defendant in error, from the very nature of the case, was dependent upon information derived from others in making up proofs of loss and in answering interrogatories propounded to her in the deposition she gave on December 8, 1904. Therefore the instruction No. 4 was not prejudicial to plaintiff in error, but more favorable to it than otherwise, because it makes no difference whether or not the insurer or its agents understood that such statements as were made were in fact made on information derived from others by the insured, it being sufficient if in fact they were so made without being recklessly made, or being willfully false. Boston Marine Ins. Co. v. Scales, supra; Metzger v. Manchester Fire Ins. Co., supra.

The next assignment of error touching the instructions given by the court is that "the court erred to the prejudice of the company in its failure to properly instruct the jury as to the effect of written statements made by the insured of her own knowledge, when the evidence conclusively shows she had no such knowledge."

Conceding that the falsity of the statements with respect to the personal knowledge of defendant in error was put in issue by the pleadings in the case, we do not find that the court was requested to instruct the jury as to the effect of the written statements made by her as of her own knowledge, unless it be instructions Nos. 1 and 2 refused, which as we

have said, were properly refused; and it would unduly extend this opinion to discuss those instructions again.

"A misrepresentation made without a corrupt motive or dishonest purpose is called legal fraud. If there be present a corrupt motive or dishonest purpose in making a representation there is moral fraud." Kerr on Fraud and Mistake, 55.

As we have remarked, there is no case to be found, as far as we are advised, holding that circumstances that would otherwise be legal fraud occurring after loss render a policy of insurance void. Legal fraud in making the contract of insurance may serve to defeat or cancel the policy, but nothing occurring after the loss but moral fraud can render the policy void. See the authorities cited above and also Runkle v. Insurance Co., 99 Iowa, 414, 68 N. W. 712.

We are cited to a number of cases which hold that the right to recover under a policy of insurance was defeated by false representations made by the insured concerning the loss, but they were cases in which the representations of the insured were admittedly false, and therefore the law as laid down in those cases can have no application here. In one of these cases, Mullin v. Insurance Co., 58 Vt. 113, 4 Atl. 817, the decision was put on the ground that the insured swore recklessly to an inventory prepared by his wife, an inspection of which would have shown many false entries intended to work a fraud on the insurer. The opinion in that case says: "If he had looked it over and wished to be honest, he would have discovered many false statements. * * * On the contrary he recklessly indorsed it without examination, and by so doing made it his own fraud within the meaning of the policy." This case was reviewed in the well-considered case of Boston Marine Ins. Co. v. Scales, supra, where the court said of it: "This is a strong case and goes to the very verge of the law, if it is not, indeed, contrary to the current of authority." It was a case, as the court said, either of "gross fraud or reckless negligence on the part of the husband," and is therefore very unlike the case at bar.

This brings us to the consideration of the last assignment of error, which is to the refusal of the court to set aside the verdict of the jury on the ground that it is contrary to the weight of the evidence.

There is nothing better settled in this jurisdiction than that the credibility of witnesses and the weight to be given to their evidence in a particular case are properly to be determined by the jury; and where the evidence, consisting of circumstances and presumptions, is conflicting, the mere fact that the court doubts the correctness of the verdict, or if the jury would have rendered a different verdict, will not be sufficient to justify setting aside the verdict foud by the jury. Kimball & Fink v. Friend's Adm'r, 95 Va. 126, 27 S. E. 901. To warrant a new trial in cases where the evidence is conflicting, the evidence must be sufficient to warrant the finding of the jury.

In this case, plaintiff in error sought to maintain three propositions: First, that the room in which the peanuts burned were stored was not large enough to contain 400 bags of peanuts of the size alleged to have been burned; second, that the character of the remains of the fire did not indicate that as many as 400 bags of peanuts had been consumed; and, third, that in fact there were not 400 bags of peanuts in the room at the time of the fire. A large number of witnesses were examined, and it would be needless for us to undertake to set out in detail the statements made bearing upon the several propositions stated. To say the least of the evidence, it was conflicting upon every point, and, therefore, as it seems to us, the case comes clearly within that class referred to in the rule governing new trials, to which we have just adverted, and is peculiarly a case in which the court would not be justified in interfering with the verdict of the jury.

Upon the whole case, we are of the opinion that the judgment should be affirmed.

Accord. Runkle v. Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712; Phoenix Ins. Co. v. Swann, 41 S. W. (Tex.) 519; Medley v. German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101; Beyer v. St. Paul Marine Ins. Co., 112 Wis. 138, 88 N. W. 57.

Where the policy of insurance provides that loss, if any, is payable to the mortgagee it does not follow that the mortgagee is the person who should make and furnish the proofs of loss, while it is doubtless true that the mortgagee has such an interest that he would be entitled to furnish the proofs, primarily the owner is the proper person to furnish such proofs. Morris v. German

American Ins. Co., 14 Ky. Law Rep. 859. Even though the policy stipulates that the proofs of loss should be made by the insured, and agent of the insured, if the facts stated are within his own knowledge is competent to furnish the necessary evidence required under the policy to be made in the furnishing of the proofs. Pearlstine v. Westchester Fire Ins. Co., 70 S. C. 75, 49 S. E. 4. Knowledge on the part of the company of a loss under the policy is the object of all stipulations requiring notice to be given. It was therefore held that a notice given to the company by its agent through whom the policy was issued at the request of the insured was sufficient notice to the company. Powers v. New England Fire Ins. Co., 68 Vt. 390, 35 Atl. 331 The policy required that proofs of loss should be delivered to the company. Held that a delivery to the agent of a foreign insurance company who was authorized to solicit applications, write and deliver policies was a sufficient compliance with the stipulation. Vessey v. Commercial Union Ins. Co. of London 18 S. D. 632—101 N. W. 1074.

If the proofs of loss are filed within time and are sufficient to give the company notice of the loss the proofs will serve and take the place of the notice stipulated for in the policy. Hartford Fire Ins. Co. v. Redding 47 Fla. 228, 67 L. R. A. 518.

The deposit of notice to the company in the United States mail is prima facie but not conclusive evidence of the giving of the notice of loss to meet the requirements of the stipulations that notice should be given. Munson v. German American Fire Ins. Co. 55 W. Va. 423.

The policy provided that the insured should furnish in his proof of loss an inventory of the property with the amount the insured claims by reason of the loss on each article. It also provided that the insured should give his knowledge and belief as to time and origin of the fire. The proof stated the place the fire originated and the time of the fire and referred to a schedule showing the amount the insured claim on the destroyed property. The property was totally destroyed. Held the proof complied with the requirement of the policy. Schilansky v. Merchant and Manufacturers Fire Ins. Co. 4 Pennewill (Del.) 293, 55 A. 114.

A statement in a policy that the proof shall state the interest of the insured and all others in the property covered by the insurance has no reference to an interest accruing after the loss. Mauck v. Merchant and Manufacturers Fire Ins. Co. 4 Pennewill (Del.) 325, 54 A. 952.

The requirements that the insured shall furnish his book of accounts or submit to an examination touching the questions of loss upon request of the company does not give the company the right to require the insured to submit to such an examination at a place other than the locality in which the loss occurred. Tucker v. Colonial Fire Ins. Co. 58 W. Va. 30, 51 S. E. 86.

The policy contained a clause that there should be no recovery

if the right of the insurer to "examine" the persons or body of the insured should be refused. Held that this stipulation gave no right to an autopsy or a dissection of the body. Patterson v. Ocean Accident & Guarantee Corporation 25 App. D. C. 46.

Proofs of loss may be waived by a local agent who has authority to make contracts of insurance, elect premiums and assign policies. Indian River State Bank v. Hartford Fire Ins. Co. 46 Fla. 283, 35 So. 228.

CHAPTER XI.

ARBITRATION AND AWARD.

NIAGARA FIRE INS. CO. v. BOON et al.

Supreme Court of Arkansas. June 1905. 76 Ark. 153

Withdrawal of Appraiser During Investigation—Effect.

Action by R. M. Boon and another against the Niagara Fire Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hill, C. J. Boon had a policy of insurance in appellant company on his store building and the adjoining building burned, injuring the intervening brick wall, the roof and front of his building. The adjuster of the insurance company and Boon failed to agree on the amount of damage, and the company invoked the arbitration clause of the policy. The clause was in the usual form of such clauses in standard fire insurance policies, providing that each party select a competent and disinterested appraiser, and the appraisers to select a competent and disinterested umpire. The appraisers were required to estimate the loss, stating separately the sound value and damage, and, failing to agree, to submit their differences to the umpire, and the award of any two in writing should be binding. The appraisers were selected, and they selected an umpire. The preponderance of the evidence establishes the facts to be that the appraisers radically disagreed, one demanding an estimate based on a new wall and the other based on a slight damage to the wall. The appraiser selected by the insurance company then called in the umpire, and it seems that he and the appraiser for the company differed more radically than he and the other appraiser.

Then the appraiser for the insurance company withdrew, and the umpire and other appraiser made the award in conformity to the policy. This suit was brought on the award, and the company had it transferred to chancery on allegations impeaching the award and seeking to set it aside. The case was tried by the chancellor, and there is much conflict in the evidence, but, as stated, a preponderance sustains the facts briefly outlined above, and which version comes accredited by the chancellor.

1. Objections are made to such testimony; some because elicited by leading questions, others because opinion evidence from witnesses not properly qualified as experts, and for other reasons. The case was heard before the chancellor, and he is presumed to have disregarded all incompetent testimony, and on trial de novo the case is weighed solely on the competent testimony; hence there is no profit in discussing these objections.

2. It is insisted that the appraisers selected by the insured did not estimate on the basis required by the policy, and thereby departed from the terms of the submission. The point turned on whether the old wall was to be treated as worthless or an estimate made on its damaged condition. There is much evidence to sustain the appraiser in his opinion that it would have to be taken down, and the value of it would not compensate the expense of tearing it down. Even if wrong in his opinion on that subject, there is not sufficient evidence against it to set aside the award as founded in mistake. Judge Sanborn thus stated the rule: "An agreement of appraisal is a contract. Appraisers who make an award under such an agreement are presumed to have acted in accordance with the law and the terms of the contract. and the burden of proof is on those who attack their award to establish the contrary by convincing evidence. Every reasonable intendment and presumption is in favor of the award, and it should not be vacated unless it clearly appears that it was made without authority, or was the result of fraud or mistake, or of the misfeasance or malfeasance of the appraisers." Barnard v. Lancashire Ins. Co., 41 C. C. A. 170, 101 Fed. 36. The evidence satisfies the court, as it

did the chancellor, that the award was fairly made. Certainly it cannot be said that it clearly appears that it was the result of fraud, mistake, misfeasance, or malfeasance of the appraiser or the umpire. The evidence against it on material questions is that of the appraiser selected by the company and adjuster, and they are contradicted by the other appraiser and umpire and the other testimony strongly sustaining the latter.

3. There is much said about the bias and partisanship of the appraisers, but no evidence is apparent to sustain a disqualification of them on this account within the rule on that subject recently announced by this court in National Fire Ins. Co. v. O'Bryan, 87 S. W. 129.

4. It is contended that the arbitration was dissolved by the appraisers, and the award made by the umpire and one appraiser acting as appraisers after the appraisers had agreed to dissolve, and that this was contrary to the terms of submission, which provided for the umpire to only act when the appraisers submit their differences to him. The evidence satisfies the court that the appraiser selected by the insurance company called upon the umpire to settle the differences, and finding him more difficult to agree with them, the appraiser then withdrew. There is some evidence that the withdrawal was under the direction of the adjuster, who learned of the situation of affairs. That is not important here, for it is thoroughly settled that an arbitration cannot be defeated, after it is properly submitted, by the withdrawal of one of the appraisers during the investigation.

Other questions are discussed as to the revocation of the arbitration by the withdrawal of the appraiser on account of the arbitrary action of the other appraiser, and other questions based on the theory of appellant that the appraiser acted without the scope of the submission and improperly. But the court is satisfied from the evidence that the appraiser's conduct was not within any of the grounds for impeaching the award; hence it is unnecessary to pursue the subject further. There was sufficient evidence to sustain the award as to the value, even if it was not an accurate valuation, it would not be open to attack unless so grossly erroneous as

to indicate bad faith or other grounds to set aside the award. Affirmed.

Accord Bradshaw v. Ins. Co. 137 N. Y. 137, 32 N. E. 1055; Barnard v. Lancashire Ins. Co. 101 Fed. 6.

HAMILTON v. LIVERPOOL & LONDON & GLOBE INS. CO.

Supreme Court of United States. May 19, 1890. 10 S. C. Rep. 945. 136 U. S. 242. 34 Law Ed. 419.

Refusal to Arbitrate.

In error to the circuit court of the United States for the southern district of Ohio.

This was an action upon a policy of insurance numbered 2,907,224, against fire, for a year from September 5, 1885, upon a stock of tobacco in the plaintiff's warehouse at 413 and 415 Madison street, in Covington, in the state of Kentucky. Among the printed "conditions relating to the methods of adjustment of loss, and the payment thereof," were the following. The tenth condition, after provisions relating to proofs of loss, certificate of a magistrate, submission to examination on oath, and production of books and vouchers, and certified copies of lost bills and invoices, further provided: "When property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value, and of the loss or damage, shall be determined by agreement between the company and the assured. But if, at any time, differences shall arise as to the amount of any loss or damage, or as to any question, matter, or thing concerning or arising out of this insurance, every such difference shall, at the written

request of either party, be submitted, at equal expense of the parties, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall select an umpire to act with them in case of their disagreement, and the award in writing of any two of them shall be binding and conclusive as to the amount of such loss or damage, or as to any question, matter, or thing so submitted, but shall not decide the liability of this company; and, until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted, the loss shall not be payable. There can be no abandonment to the company of the property insured, but the company reserve the right to take the whole, or any part thereof, at its appraised value." By the eleventh condition, "it is, furthermore, hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided." The answer put in issue the amount of loss, and set up that the plaintiff had not performed the conditions of the policy on his part, but had refused to submit a difference between the parties as to the amount of loss to appraisal and award as provided in the policy, and, against the defendant's protest, had sold the property insured, and deprived the defendant of its right under the policy to have an appraisal made, and to take the property, or any part thereof, at its appraised value, and had thereby waived the right to recover under the policy. At the trial the plaintiff offered evidence tending to prove the execution of the policy, a loss by fire on April 16, 1886, occasioned by the tobacco becoming saturated and impregnated with smoke, and thereby greatly damaged, and proofs of loss in accordance with the policy. The only other evidence introduced was a correspondence between the parties at Cincinnati, the material parts of which are as follows:

April 23, 1886. Defendant to plaintiff: "If any claim for loss is to be made under policy No. 2,907,224 of this company, you will be expected to conform strictly to the conditions of said policy respecting the method of presenting

claims for loss; and no conditions of the policy, or rights of the Liverpool and London and Globe Insurance Company thereunder, are in any manner waived or abandoned by that company. You will of course understand the necessity of not removing or disposing of any part of said stock, upon which loss is proposed to be claimed, pending the settlement of the claim, unless by agreement with the insurance companies."

April 24, 1886. Plaintiff to defendant: "It is necessary that I should have the room in which the property now is for the purpose of prosecuting my business. I propose to the company, furnishing it with the invoice of the cost or value of the property before the loss, to send the entire stock to be sold at auction." "If this is not assented to by the company, I shall be obliged to remove the property from my warehouse, and put it in storage; and, in my judgment, the expense attending it, and the disposition of it, will considerably increase the amount of the loss. The property is ready for examination by your company. I desire that such examination as you wish to make shall be made at once, and that you will advise me forthwith whether you assent to the sale of the property by public auction in the manner proposed, as the fairest and most satisfactory mode of ascertaining its present value."

April 24, 1886. Defendant to plaintiff: "This company will be pleased to have your claim presented in due course and form, giving" (among other things) "the amount of loss or damage you claim on the whole, and also as against this company, as it may be necessary to have the stock appraised by disinterested appraisers after receipt of proofs. We cannot consent to its removal, unless it be at your own expense. It should, if possible, be left where it is, though there can be no objection to your removing it to some other warehouse at your own expense, where it can be readily inspected by appraisers. We cannot consent to your disposal of it by sale. The matter of determining the value or damage will be one for mutual conference and agreement."

April 26, 1886. Plaintiff to defendant: "I inclose proof of loss under policy of your company, with invoice attached,

in compliance with the requirements of the policy." "The property described and damaged has been invoiced and arranged, and is ready for examination by your company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business, and each day of delay involves considerable loss and expense to me. As before advised, I propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies."

April 27, 1886. Defendant's agent to plaintiff: "I beg to acknowledge receipt of papers purporting to be proofs of loss under our policies 2,907,224 and 2,823,517. The same will have prompt examination and attention. Noting your purpose soon to sell the stock, permit us to say that we protest against such disposition of it at this stage, and against this ex parte way of determining the loss sustained. Conditions of our policy provide the manner and mode of determining the loss or damage; and we hereby formally demand an appraisal of the stock as to value and damage under each policy, each party to name a competent and disinterested party."

April 27, 1886. Plaintiff's counsel to defendant: "Mr. Hamilton is obliged, for the prosecution of his business, to remove at once the property covered by the insurance from his factory in which the property was insured." "I do not find any provision in your policy restricting the assured, under such circumstances, from removing or selling the damaged property. If you claim that any such provision has that force, I should be glad if you should at once call my attention to it." "The property covered by the policy above referred to will require at least two weeks from this date to remove and bring to sale, and during that time it will be subject to whatever examination you may wish to make." "It does not occur to me that there can be any impediment in ascertaining the amount of the loss by an arbitration, in the manner provided by the policy, from the course which Mr. Hamilton indicates that he proposes to pursue."

April 28, 1886. Defendant to plaintiff's counsel: "It may be sufficient to point out that the appraisement provided by

the terms of our policies, in the printed clause referred to, contemplates the possibility of the company exercising the right therein reserved to take the property, or any part thereof, 'at its appraised value.' A sale of the property prior to such appraisement would deprive the company of this right We have refused, and still refuse, to consent to any disposition of the property prior to the appraisement, or to any ex parte method of fixing the amount of the loss, which our policies provide shall be determined 'by agreement between the company and the assured,' and by appraisement in case of difference. As to the removal of the property, your client has stated that the loss would thereby be materially increased. You will understand, therefore, that such additional loss would necessarily be borne by him, and not by the company, whose protest against such removal has been made. The proposed removal is expressly designed by Mr. Hamilton for his own advantage in the ordinary prosecution of his business, and the indemnity furnished by insurance does not extend to losses sustained in that direction. We protest against this removal, furthermore, because it takes away from the view of the appraisers the actual surroundings, location, and condition of the property at the time the difference of opinion arose, and would thus materially affect the judgment of the appraisers as to the loss sustained. We ask you for a direct answer to our request for an appraisement, and desire that any further communication be directed to that point only. You will please take notice that any disposition of the property by sale prior to the appraisement will be understood and accepted by us as a refusal upon the part of your client to permit such appraisement, and as a relinquishment of all claims under the policies of this company."

April 28, 1886. Defendant and other insurance companies to plaintiff: "The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco factory, Nos. 413 and 415 Madison street, Covington, Ky., claimed to have been damaged by fire on April 16, 1886, beg leave jointly to take exception to the amount of claim made, and to demand that the question of

the value of, and the loss upon, the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire jointly to protest against the removal, sale, or other disposition of the property until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such ex parte action."

April 29, 1886. Plaintiff's counsel to defendant and other insurance companies: "Mr. Hamilton is not endeavoring to obtain any unfair advantage or unfair adjustment of his loss against the companies. He has believed that, in view of the fact that the traffic in tobacco is so large in this city, and substantially all of it, at least ninety-nine per cent. of the leaf tobacco business, is transacted by sale at public auction, that a sale of this tobacco presented the fairest mode of ascertaining its actual value as it stands. It is, in substance and effect, an appraisement in detail of every package by the entire trade in this city. But, in view of the fact that the insurers seem to demand arbitration by arbitrators, and that you propose to select a competent person, which we understand to mean a man acquainted with the manufacture of tobacco, to act as arbitrator in your behalf, Mr. Hamilton will accede to your proposition, upon the express understanding that the arbitrators selected shall have a full opportunity to examine the stock of tobacco, and that it shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award." "If the proposed arbitration is satisfactory, will you at once inform me of the arbitrator selected by you, and submit to me the form of agreement of arbitration which you propose? Mr. Hamilton will do the like in respect to the arbitrator selected by him."

April 30, 1886. Defendant and other insurance companies to plaintiff's counsel: "We must insist upon arbitration, in accordance with the terms of our several contracts, with-

out importing into it any conditions as to the sale of the property. Such conditions would be incompatible with the provisions of our several policies of insurance, and the rights of the insuring companies thereunder. As soon as Mr. Hamilton indicates his readiness to proceed with the arbitration called for, we will submit the name of an arbitrator, and also a form of agreement for arbitration."

April 30, 1886. Plaintiff's counsel to insurance companies: "Mr. Hamilton, and I in his behalf, deny that the arbitration in the manner indicated is in violation of the terms of any of the policies, or imports any condition into it which the insured is not entitled to insist upon, or which is incompatible with the provisions of the several policies of insurance, or the rights of the insurance companies thereunder. Mr. Hamilton is ready, and has directed me to express his readiness, to proceed at once with an arbitration, which, as he understands, it is in substantial compliance with the arbitration provided for in all the several policies." "I wish to say that, as I understand the expression in my letter of the 29th, that 'it' (the tobacco) 'shall then be sold at public auction, in order that its value thus ascertained, together with such other evidence as either party may desire to offer, may be presented to the arbitrators before they make their award,' does not in any wise call upon the companies to consent to a sale of the property. Mr. Hamilton is quite ready to take upon himself the responsibility of selling it. It simply requires that the arbitration shall be commenced before the sale, when the arbitrators may have an opportunity of examining the property, and that the award shall not be made until after the sale has taken place, and the assured has had an opportunity to submit the result of it, with other competent evidence, to the arbitrators before the award is made."

May 3, 1886. Insurance companies to plaintiff's counsel: "We herewith inclose a form of agreement for 'submission to appraisers,' which is in practical accordance with the conditions of the policies of the several companies, and which all the companies are willing to sign, and abide by the award reached thereunder. We must again decline to entertain

your proposition that the arbitrators, after examining the stock, shall postpone their award until after the stock shall have been sold, when the result of such sale, with other evidence, shall be submitted to the arbitrators. We insist that the arbitration provided for in such case by our policies is in no sense a court for the hearing of evidence. The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information, and the forming of their own judgments as to the value and damage of the goods; but we insist that, under the conditions of the several policies, there can be no abandonment of the stock to the companies, and that after an award has been reached the companies have the right to take the stock in whole or in part at their appraised value. The companies propose to stand upon the conditions of their policies, and decline all propositions looking to a waiver thereof, or adding new and inconsistent conditions thereto." The principal part of the form of submission to appraisers inclosed in this letter was as follows: "It is hereby agreed by Robert Hamilton, of the first part, and the several insurance companies, by their representatives, whose names are hereunto affixed, of the second part, that———and———shall appraise and estimate the loss by fire of April 16, 1886, upon the property of Robert Hamilton, as specified below, and as hereinafter provided. In case of disagreement, said appraisers shall select a third, who shall act with them in matters of difference only. The award of said appraisers, or any two of them, made in writing, in accordance with this agreement, pursuant to the terms of the policies, shall be binding upon both parties; but it is understood that this agreement and appraisement are only for the purpose of fixing the sound value of the property before the fire, and the loss or damage thereon occasioned by said fire, and shall not waive, invalidate, or terminate the right of the insurers to take said property at its appraised value, or any other rights of either party hereto, but the same are to be construed solely by reference to said policies."

May 4, 1886. Plaintiff's counsel to insurance companies: "There can be no misunderstanding as to the position taken by the companies and the assured in this matter. 1st. I un-

derstand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment, and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made. This Mr. Hamilton declines to do. 2d. Mr. Hamilton is willing that the companies jointly, or as they may arrange between themselves, shall make their own appraisement, through their own appraisers, of the value of the stock, and that they shall jointly, or either of them with the consent of the rest, have the right to take the stock, in whole or in part, at their appraisal. 3d. Mr. Hamilton has made and makes no claim to abandon the property, and he has made and makes no claim that the companies shall consent to the sale by him of the damaged stock." Inclosed in this letter, and signed by the plaintiff's counsel, was the following: "To the Liverpool and London and Globe Insurance Company, and the companies jointly acting with it, in respect to the loss sustained by Robert Hamilton on the property in Nos. 413 and 415 Madison street, Covington, Ky.: Mr. Hamilton demands of the several insurance companies an arbitration of the amount of the loss sustained upon the goods covered by fire on the 16th of April, and will select an arbitrator to represent him in pursuance of the provisions of the policy; it being stipulated in the agreement for arbitration that the several companies and the assured shall be duly notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, as well as personally examine the damaged goods, in considering and awarding the amount of the loss."

May 5, 1886. Insurance companies to plaintiff's counsel: "Your communication of the 4th is at hand. We have nothing to add to our letter of the 3d; and if, as we are made to understand, Mr. Hamilton declines to consent to a form of 'submission to appraisers' that does not provide for the introduction of 'all competent legal testimony that may be offered by either party' (under which provision, as you have repeatedly declared, Mr. Hamilton would seek to present evi-

dence based on a sale of the property), we must accept your communication as a refusal to comply with our request, and with the conditions of the policies of insurance, which are clearly incompatible with your wishes in the matter."

May 7, 1886. Insurance companies to plaintiff's counsel: "Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to-wit: 'I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment, and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made.' This does not correctly state our position, which remains now as stated in our communication of the 3d, to-wit: 'The appraisers may, in their discretion, seek any evidence they deem necessary for their own full information.' What we do object to and protest against is the sale of the goods, or the consideration by the appraisers of evidence founded on that fact or result. If the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining the duties of the appraisers, and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party."

May 8, 1886. Defendant to plaintiff's counsel: "On behalf of the Liverpool and London and Globe Ins. Company, we demand an appraisal of the value of and damage to the goods insured under our policies Nos. 2,823,517 and 2,907,224, issued to Robert Hamilton, of Covington, Ky., as the same could not be determined by mutual agreement between us, and we take exceptions to the amount of loss and damage as stated in your claim. We herewith submit a form of agreement of submission to appraisers which we deem in strict accordance with the terms and conditions of our policies, and upon your assent thereto will be prepared to name our appraiser." The form inclosed in this letter did not materially vary from that inclosed in the letter of May 3, 1886.

May 10, 1886. Plaintiff's counsel to defendant: "In view of the number and diverse provisions of the several policies upon Mr. Hamilton's property, and of what has transpired, I do not conceive that the several companies are now entitled each to demand a separate submission to arbitration by Mr. Hamilton. It does not seem to me that any provision in the policies of your company provides for a submission to appraisers in the manner expressed in the form of agreement inclosed; and I have already expressed in the correspondence, upon the joint demand of all the companies, my reasons for this opinion, and my objections to this form of submission."

May 13, 1886. Defendant to plaintiff: "Objecting to the amount of your claim for loss and damage under policies 2,823,517 and 2,907,224, we demand, according to condition 10 of the policies, that the differences which have arisen between us as to sound value and loss or damage to the goods covered by said policies shall be submitted, at equal expense between us, to competent and impartial persons, one to be chosen by each party, and the two so chosen shall elect an umpire to act with them in case of their disagreement. We name as our appraiser Wm. Spear, of St. Louis, and, upon the naming of your appraiser, we will meet you to sign an agreement embodying the provisions of our policies without any conditions. Please take notice that this company reserves the right to take the whole or any part of the property insured at its appraised value; and you are further notified that, until such an appraisal is permitted and had, our loss, if any, will not be payable."

May 15, 1886. Plaintiff's counsel to defendant: "Mr. Hamilton adheres to the position taken by him in the joint correspondence between the insurers and Mr. Hamilton, and myself in his behalf. Mr. Hamilton has acted upon the conclusion reached in that correspondence, and I do not understand that your company proposes to change its own attitude as taken in that correspondence."

May 20, 1886. Plaintiff's counsel to defendant. Inclosing a notice in a newspaper of the sale by auction on May 29, 1886, at the plaintiff's warehouse in Covington, of the tobacco insured by the policy in suit.

June 3, 1886. Plaintiff's counsel to defendant: "Mr. Hamilton has disposed of the property claimed to have been damaged in the fire of April 16th, by sale at public auction, in pursuance of the notice communicated to your company. If your company really desire to submit to arbitration the question of the amount of loss sustained by Mr. Hamilton, notwithstanding all that has transpired, Mr. Hamilton is quite ready now to submit that question to competent and impartial arbitrators. He simply demands, the arbitrators being chosen, that, in the agreement for submission, it shall be provided that the company and the assured shall be notified of the time of the hearing of the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time shall be prescribed within which an award shall be rendered."

June 7, 1886. Defendant to plaintiff's counsel: "As you have, in spite of our protest, sold and scattered the goods so that an appraisement within the terms of our policies is now impossible, and have thereby deprived us of our right to take the property, or any part thereof, at its appraised value, we must accept your action as a refusal to accede to our demand for submission of the differences that have arisen between us. By the course pursued, Mr. Hamilton has, in our judgment, waived any rights he may have had under the policies, and this company will stand upon its legal rights in the premises."

The court, after the case had been argued, instructed the jury that it appeared from the evidence that the defendant requested the plaintiff, in writing, to submit the amount of his loss or damage under the policy to competent and impartial persons, and the plaintiff refused so to do, and instructed the jury to return a verdict for the defendant, which was accordingly rendered. The plaintiff excepted to these instructions, and after judgment on the verdict sued out this writ of error.

Mr. Justice Gray, after stating the facts as above, delivered the opinion of the court.

The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to

the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action. Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. Scott v. Avery, 5 H. L. Cas. 811; Viney v. Bignold, 20 Q. B. Div. 172; Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250; Reed v. Insurance Co., 138 Mass. 572, 576; Wolff v. Insurance Co., 50 N. J. Law, 453, 14 Atl. Rep. 561; Hall v. Insurance Co., 57 Conn. 105, 114, 17 Atl. Rep. 356. The case comes within the general rule long ago laid down by this court: "Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so." U. S. v. Robeson, 9 Pet. 319, 327. See, also, Railroad Co. v. March, 114 U. S. 549, 5 Sup. Ct. Rep. 1035. Upon the evidence in this case, the question whether the defendant had duly requested, and the plaintiff had unreasonably refused, to submit to such an appraisal and

award as the policy called for, did not depend in any degree, as in Uhrig v. Insurance Co., 101 N. Y. 362, 4 N. E. Rep. 745, cited for the plaintiff, on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties, presenting a pure question of law to be decided by the court. Turner v. Yates, 16 How. 14, 23; Bliven v. Screw Co., 23 How. 420, 433; Smith v. Faulkner, 12 Gray, 251. That correspondence clearly shows that the defendant explicitly and repeatedly, in writing, requested that the amount of the loss or damage should be submitted to appraisers, in accordance with the terms of the policy, and that the plaintiff as often peremptorily refused to do this, unless the defendant would consent in advance to define the legal powers and duties of the appraisers, which the defendant was under no obligation to do, and that the plaintiff throughout, against the constant protest of the defendant, asserted, and at last exercised, a right to sell the property before the completion of an award according to the policy, thereby depriving the defendant of the right, reserved to it by the policy, of taking the property at its appraised value, when ascertained in accordance with the conditions of the policy. The court therefore rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that the plaintiff, therefore, could not maintain this action. If the plaintiff had joined in the appointment of appraisers, and they had acted unlawfully, or had not acted at all, a different question would have been presented. Judgment affiirmed.

It has been held that an arbitration provision in a mutual benefit society policy is binding and effectual. Road v. Railway, etc. Ass'n, 31 Fed. 62; Van Poucke v. Society, 63 Mich., 378; Robinson 2 Templar Lodge, 117 Cal. 370. And this doctrine has been extended to mutual fiire insurance companies. Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386. Courts now seem inclined to uphold such agreements whenever possible.

RANDALL et al. v. AMERICAN FIRE INS. CO. OF PHILADELPHIA.

Supreme Court of Montana. Jan. 26, 1891. 10 Montana 340.

Demand for Arbitration—Proofs of Loss.

Harwood, J. The cause of action herein is founded upon an insurance policy whereby appellant insured and agreed to indemnify respondents against loss which might happen by the destruction or damage of appellant's building, situate at Moreland, Gallatin county, Mont., known as the "Moreland Hotel," and certain furniture therein contained, by fire, to the extent of $1,500; the sum of $1,125 being placed upon said building, and the sum of $375 upon the said furniture. There were also in force during the same period three other policies of concurrent insurance issued by certain other companies in favor of plaintiffs upon the same property, each in the sum of $1,500, and distributed in like amounts on said building and furniture as aforesaid. While said insurance contracts were in force, all of said property, except a small portion of the furniture, was destroyed by fire. This action was brought to enforce payment of said $1,500 indemnity, and the trial resulted in a judgment for plaintiffs in said sum, with interest and costs; whereupon defendant moved for a new trial upon a statement of the case, on the ground of insufficiency of the evidence to justify the verdict, and that the same is against law; and also errors of law occurring at the trial, and excepted to by the moving party. Said motion being overruled, the case is brought up by appeal from the order overruling the same, as well as appeal from the judgment.

The insurance policy involved provides among other conditions, as follows: "The amount of loss or damage to be estimated according to the actual value of the property at the time of the loss, and to be paid within sixty days after the loss shall have been ascertained in accordance with and within the terms and conditions of this policy, and proof of the same, satisfactory to the said company, shall have been

made by the assured, and received at the office of the company in Philadelphia. It shall be, however, optional with the company to repair, rebuild, or replace the property destroyed or damaged with other of like kind and quality, within a reasonable time, giving notice of its intention so to do within sixty days after receipt of proofs herein required; and, in case the company elects to rebuild, the assured shall, if required, furnish plans and specifications of the building herein described. The assured sustaining loss by fire under this policy shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular account, by separate items, and proof thereof, signed and sworn to by the assured, setting forth: (1) A copy of the written portion of this policy, and all indorsements hereon; (2) other insurance, if any, on same property, or any portion thereof, with copies of written portions of each policy, and indorsements thereon; (3) the actual cash value of the property described at the time immediately preceding the fire; (4) the ownership of the property described, and the interest of assured in same; (5) for what purposes, and by whom, the building herein described, or containing the property herein specified, and the several parts thereof, were used at the time of the fire; (6) the date of the loss, and the amount thereof; (7) how the fire originated, as far as the assured knows or believes." The amount of sound value and of damage to the property may be determined by mutual agreement between the company and the assured; or, if they fail to agree, the same shall then, at the written request of either party, be ascertained by an appraisal of each article of personal property, or by an estimate in detail, if a building, by competent and impartial appraisers, one to be selected by each party, and the two so chosen shall first select an umpire to act with them in case of disagreement; and if the said appraisers fail to agree they shall refer their differences to such umpire; and the award of any two, in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not decide the validity of the contract, or any other question except the amount of such loss or damage. It is further provided in said policy

that "the company shall have the right to take any of the articles damaged at their appraised value; and, until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable." The plaintiffs, in their complaint, set up the contract of insurance, alleged the destruction of the property by fire, and "that plaintiffs' loss thereby was $6,164 on said Moreland Hotel, and $1,851.14 on said furniture and fixtures contained in said hotel." Plaintiffs further allege that they furnished defendant notice of said loss, and that "defendant, by its adjusting agent, made a personal examination into the circumstances of said loss and fire, and made a request of plaintiffs that the value of said building be ascertained by arbitrators to be mutually chosen." That on the 10th day of September, 1887, plaintiffs and defendants did so refer the question of value of said building to arbitrators mutually agreed upon, John Ketchum and R. W. De Noille, of Helena, aforesaid, who reported and decided the value of said building at the time of said fire to be $7,179. "That on the 14th day of September, 1887, the plaintiffs furnished the defendant with proofs of said loss, and of their interest in said property, and otherwise fully performed all the conditions of said policy on their part. That on the 15th day of September, 1887, the defendant returned said proofs of loss to plaintiffs, and declined to pay said loss, assigning as the single ground therefor that said proofs were not satisfactory, for the reason that they referred to the estimate made by said arbitrators. That no demand has been made by defendant for a further or any other reference of said loss on building or furniture, since said proofs of loss were so furnished; nor has defendant requested any further proofs of loss; nor did the defendant, within sixty days after receipt of proofs, give notice of their intention to rebuild or restore any of said property." Defendant, by answer, denied the value of said building to be the sum alleged by plaintiffs, or any sum exceeding $3,250; and denied the value of said furniture to be the sum alleged by plaintiffs, or any sum exceeding $900; and said answer further put in issue all the allegations of plaintiffs' complaint except the existence of said insurance policy, the destruction of said property by fire, save

a small portion of the furniture, and some other allegations not necessary to notice at this time. In addition to the specific denials of plaintiffs' allegations, defendant alleged by way of new matter of defense that the plaintiffs left at the office of defendant's agent in the city of Helena, while said agent was absent therefrom, on or about September 15, 1887, "some paper, which falsely stated that arbitrators had been agreed upon by plaintiffs and defendant;" that plaintiffs' attention was called to this fact by defendant's agent on the same day, and thereupon plaintiff asked permission to retain said paper, stating that said paper should not be regarded or treated as having been tendered to defendant, to which defendant by its agent assented. The answer further averred that plaintiffs on or about September 14, 1887, "fraudulently, and with intent to deceive and obtain an unfair advantage over defendant in the settlement of said claim, falsely represented to defendant's agent that two certain persons had been agreed upon by plaintiffs and defendant as arbitrators to determine and decide upon the value of said building and the cost of rebuilding the same, and that such arbitrators had determined and decided that the value of said building was at the time of the fire $7,179; whereas in truth and in fact, as plaintiffs well know, such persons had never been agreed upon or selected as arbitrators, and, as plaintiffs well knew, such persons had never determined, as arbitrators or otherwise, that said building was of the value of $7,179, or that it would cost said sum, or any other particular sum, to rebuild the same." The answer further averred that defendant requested plaintiffs to furnish it with plans and specifications of said building so destroyed by fire, but that plaintiffs neglected and refused to furnish the same; and that no proofs, plans, and specifications, declarations or certificates have been furnished, and no examination or arbitration has been permitted or furnished by plaintiffs, or had, as required by the conditions of said policy of insurance. This new matter of defense was controverted by plaintiffs' replication.

The first and main point insisted upon by appellant is that this action is brought upon an alleged award by arbitrators, and that no evidence of value of the property destroyed, except to establish an award, was admissible. This point was raised by defendant in the lower court at the trial, and objec-

tion was made to the introduction of any evidence as to the value of the property or the amount of said loss, except to establish an award. This objection was overruled, and the court admitted, over the objection and exception of defendant, evidence offered by plaintiffs tending to prove the allegations of the complaint as to the value of the property destroyed and the loss sustained by plaintiffs, independent of the appraisal or award of arbitrators as alleged in the complaint. Proof was also admitted on behalf of plaintiff in respect to the alleged submission of the question of the value of said building and plaintiffs' loss by the destruction thereof to arbitrators, and the alleged award by them made. Appellant's objection and exception aforesaid is based upon the terms of the policy and the clause which provides that "until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable." Appellant's position is that, until such appraisal and award is made by arbitrators or appraisers chosen and acting as provided by the terms of the policy, the claim of plaintiffs is not matured for action, unless plaintiffs allege and prove that they demanded such arbitration or appraisal, and the failure to arbitrate was without the fault of plaintiffs. Appellant further contends that plaintiffs failed to prove the selection of arbitrators or appraisers, and the appraisement by them and award of the value of the property destroyed, in the manner provided by said policy. We think, without doubt, plaintiffs failed in this particular, for the evidence does not show a compliance with the terms of the policy as to the selection of appraisers, or a compliance with its terms by them in appraising the property, and making an award of value. For a proper understanding of the case and the application of our conclusion herein it is necessary to make a brief summary of the conduct of the parties from the time the loss occurred until the action was brought. The evidence shows that immediately after said property was destroyed by fire plaintiffs notified defendant's agent thereof by telegram. Soon after this, defendant's agent visited the place of fire, inspected and listed the furniture saved, took rough measurements of the foundation of the building, and then proceeded to Bozeman, where he was joined by Flowers, one of

the plaintiffs, who brought with him the manager who was in charge of said hotel at and previous to the time of said fire. There the plaintiff Flowers, with said agent, obtained from stores certain lists and prices of furniture bought to furnish said hotel. The manager of said hotel assisted in giving said agent information of the articles in said hotel at the time of the fire. The agent says in his testimony: "We had Barrett [the manager of said hotel] take the rooms, one by one, and had him designate all articles of furniture in each room, and, by means of invoices which we had, put the prices of the articles. This list of articles here was obtained from Barrett, and the prices were obtained from the invoices, and these invoices were obtained at the stores in Bozeman where the goods were bought." Said agent of defendant also testified that while Barrett was thus giving a list of the furniture in said hotel "Flowers was occupied in giving particulars of the building, and the construction of it, to Mr. Crook and a builder we had secured at Bozeman to make an estimate." After such inquiries, estimates, and lists were made at Bozeman, defendant's agent returned to Helena, and on the following day met said Flowers at Helena, and handed him a letter, in which said agent informed Flowers that he would "understand that the inquiries made do not in any respect supersede or waive any of the conditions or requirements of the policies; but they have the same force, and call for the same full compliance, as if nothing whatever had been done by us in the premises." A few days thereafter two of the assured came to the office of the said agent, and one of them delivered to the agent a paper intended as a proof of loss. Thereupon said agent called the assured's attention to some particulars in which said paper did not comply with the terms of the policy as a "proof of loss." One of the assured then asked said agent for a blank used for the purpose of making proof of loss, which was furnished. Then one of said assured commenced to fill up such blank, when said agent informed assured that it would be necessary to have a builder "make an estimate on the building;" and, in reply to an inquiry by the assured as to names of some builders who would be competent to make such an estimate, said agent named three different builders or firms of builders as "reliable

builders" for the assured to apply to, and engage some of them to make an estimate on the said hotel, among whom was the firm of Ketchum & DeNoille. The evidence on the part of plaintiffs is to the effect that, when said agent named said builders, Mr. Lounds, one of the assured, said to the agent: "Before we go further in this matter, it is understood that estimates furnished by either of these firms will be satisfactory to you?" to which the agent replied: "Yes, certainly; we have done business with all three of them." On the part of defendant said agent testifies to the effect that he does not think Mr. Lounds asked such a question; that most of his conversation was with Mr. Flowers, that Mr. Flowers asked "a similar question" to which said agent replied that "the builders named were all reliable men, and had made estimates for us before on buildings." The assured then engaged Ketchum & De Noille, one of the firms of builders named by said agent, to make an estimate of said hotel building. Such estimate was made from details and specifications furnished by assured, and was designated as "an estimate of the cost of replacing the hotel building at Moreland." Said estimate was delivered to defendant's agent; and said agent, not being satisfied therewith, required of said builders a more detailed estimate, which was furnished. Said builders took no account of and made no estimate upon the furniture destroyed in said hotel. It appears by the testimony of De Noille that the estimate of said building was made principally by Ketchum, and that it was not understood by said builders that they were to act as arbitrators, and he did not understand that they acted as such. It does not appear that any "umpire" was chosen, and the record shows that said estimate was not returned "on oath." At the time said estimate was being made by said builders the assured had prepared what they termed "proofs of loss," and the same was served on said agent. It appears that one proof of loss was made for each company having a policy in force on said property, and the four were delivered to said agent in one package. Upon examining one of said papers defendant's agent found that it contained a "clause referring to the loss of the building, as estimated by Ketchum & De Noille & Co., builders, selected by agreement between the agent of the company and assured

to make estimates." Thereupon the agent returned all of said proofs of loss to the attorney who had delivered them for the assured. The next day said agent explained to said attorney his objection to said proofs of loss, which was that said proofs contained said clause in reference to Ketchum & De Noille having been "agreed upon." That appears to have been the only objection to said proofs asserted. Defendant's agent insisted that said clause should be stricken out, and assured refused to strike the same out.

The foregoing facts were proved without any essential conflict, and are taken principally from testimony introduced on behalf of defendant. There is a dispute between the parties to the action as to an arrangement made between the attorney of plaintiffs, who delivered said proofs of loss, and defendant's agent, whereby the same were retained by said attorney with the understanding that such proofs were to be considered as not having been delivered to defendant's agent. The evidence is conflicting upon that point, therefore it is not open for any consideration now. Counsel for appellant contends that defendant would have been prejudiced and injured by the retention of said proof of loss with said objectionable clause therein; that it was justified in returning the same to assured; that the refusal of assured to strike out said objectionable clause and return said proofs was a failure to make proof of loss, as required by the policy. Appellant construes said clause as an attempt on the part of the assured to involve defendant in an implied admission of a material statement of fact which in truth never occurred, and which statement was false. We do not gather such impression from the evidence. The evidence introduced on the part of defendant alone shows a state of facts from which the assured could in good faith have presumed that Ketchum & DeNoille were chosen by agreement to make the required estimates on said hotel building, although they were not chosen as appraisers in the manner provided by the policy; nor did they proceed to make appraisement and return award strictly in the manner provided by the policy. The proof of loss in question, as shown by the record, contained no statement to the effect that Ketchum & De Noille were chosen as arbitrators or appraisers by agreement between the com-

pany and the assured, or that they made or pretended to make an appraisement or award, as required by the policy. The proof contains the following statement: "Loss on building, as estimated by Ketchum, De Noille & Co., builders, selected by agreement betwen agent of Cos. and assured." Under the circumstances of the selection of said builders and the making of an estimate by them we see no evidence of fraud, trick, or deceit in the insertion of that statement in the proof of loss. Moreover, had said statement been absolutely false in fact, we do not agree with the proposition of defendant's counsel, that the retaining of said proofs of loss would have bound defendant by an implied admission of the truth of such statement, under the circumstances shown in the case. No such implied admission could arise against defendant by merely retaining such paper after denouncing such objectionable statement as untrue, and demanding its elimination from said proof.

We return to the main question raised upon this appeal, i. e., that "plaintiffs must recover on an award by arbitrators or appraisers, if at all." The question as to how far courts will be governed by a provision in a contract requiring that controversies arising as to the rights and liabilities of parties thereunder be submitted to arbitration has engaged the profound consideration of both American and English courts of last resort. The conclusion reached, and probably settled beyond further controversy, is that a provision in a contract requiring all differences or controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration, will not be allowed to interfere with or bar the litigation of such controversies when brought into court. To enforce such provisions would be to allow parties to barter away the jurisdiction of courts to determine the rights of parties and redress their wrongs. Therefore such provision is disregarded, as against public policy. But many of the same eminent authorities hold that a provision in a contract requiring that the value or quantity of a thing which might be involved in a controversy thereunder be ascertained and determined by arbitration, or in some other possible and reasonable manner, does not oust the jurisdiction of the courts, but only requires a certain character of evidence of a fact in

controversy. Therefore a provision in a contract like the one under consideration in the case at bar, requiring that the value of the assured property, under certain conditions, shall be ascertained by appraisal, is not disregarded as against public policy, but is upheld as valid. Scott v. Avery, 5 H. L. Cas. 811; Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. Rep. 945; U. S. v. Robeson, 9 Pet. 325; Insurance Co. v. Clancy. 71 Tex. 5, 8 S. W. Rep. 630; Wolff v. Insurance Co., 50 N. J. Law, 453, 14 Atl. Rep. 561; Gasser v. Sun Fire Office, 42 Minn. 315, 44 N. W. Rep. 252; Old Saucelito L. & D. D. Co. v. Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. Rep. 232; Sutro Tunnel Co. v. Segregated Belcher Min. Co., (Nev.) 7 Pac. Rep. 271; Holmes v. Richet, 56 Cal. 307. The policy in the case at bar requires that, if the parties fail to agree upon the amount of damage, "the same shall then, at the written request of either party, be ascertained by an appraisal" by "competent and impartial appraisers," one to be selected by each party, and the two to select an umpire, etc. It is insisted by counsel for appellant that said clause, viewed in connection with the other provisions of the policy, and especially the clause that provides that "until such proofs as above required are produced, and examinations and appraisals are permitted, the loss shall not be payable," makes it obligatory upon the assured in this action to prove the amount of loss or damage by an appraisal obtained in the manner required by the policy, or show a fair endeavor and failure without plaintiff's fault to get such an appraisal; otherwise plaintiffs' suit in court is premature, and must fail. This is claimed by defendant's counsel to be an imperative requirement of the plaintiffs, whether defendant requests such appraisal or not. There is no showing that either party requested such an appraisal. The defendant, by answer, expressly denies that it "made a request of plaintiffs that the value of said building be ascertained by arbitrators to be mutually chosen, or to be chosen in any other manner." The plaintiffs alleged in their complaint "that no demand has been made by the defendant for a further or any other reference of said loss on building or furniture or fixtures since said proofs of loss were so furnished." This allegation is not denied.

In support of their position counsel for defendant cites certain authorities, which we will now briefly review. In the case of Old Saucelito L. & D. D. Co. v. Commercial Union Assur. Co., supra, it appears from the opinion of the court that the complaint stated "facts showing that a difference arose as to the amount of loss;" "that plaintiff thereupon, and on request of defendant, chose" arbitrators, to whom was submitted "all differences of opinion as to the amount of said loss." The plaintiff further averred that the arbitrators so selected failed to agree on the amount of loss or damage, and failed to select a third person to act with them in case of disagreement, and also failed to make an award; and the plaintiff, after waiting a reasonable time, withdrew from such arbitration. But the court found on the trial that no arbitrators were chosen, and no differences as to the amount of damages were submitted to arbitrators, "and that the failure to submit such differences of opinion to arbitration was in no manner the fault or result of any action suffered or taken by defendant, but, on the contrary, defendant had always been willing to submit such differences." Upon that state of facts and the authorities it was held that plaintiff could not recover. It should be remembered that in this case the complaint alleged that differences arose as to the amount of the loss, and that defendant demanded arbitration. In the case of Adams v. Insurance Cos., 70 Cal. 198, 11 Pac. Rep. 627, it appears that differences arose between the companies and the assured as to the amount of loss, and no demand was made by either party for an arbitration, as provided in the policies. The court, referring to the case reported in 66 Cal., supra, held that until adjustment of the claim by mutual agreement or by arbitration, or a fair effort was made by the assured to obtain such arbitration, no action could be maintained. In the case of Carroll v. Insurance Co., 72 Cal. 299, 13 Pac. Rep. 863, it appears that an arbitration was required by the policy to determine the amount of loss in case of differences as to the same, and that such arbitration was had; but when the plaintiff brought suit he declared upon the policy generally, ignoring the award, and made no mention of the fact that an award had been attained. It was held that the award was

a necessary element of plaintiff's cause of action. The facts involved in these California cases distinguish them from the case at bar, but in the main appellant's position is supported by them. The case of Lovejoy v. Insurance Co., 11 Fed. Rep. 63 (U. S. C. C.), is also cited by appellant's counsel. But that was an action by creditors of the assured to enforce payment of the loss to them. It was found that no preliminary proofs of loss had been made, as required by the policies. Nor was there satisfactory evidence of waiver of such proofs. So it was held by Judge Blodgett that the claims were not in such condition that the assured could maintain an action thereon; and, of course, it followed that creditors of assured could not compel payment of these claims by garnishment process. In his opinion the learned judge, after finding that the preliminary proofs had neither been made nor waived, also mentions the provision in some of the policies before him, requiring the amount of the loss or damage to be fixed by arbitration in case of dispute, and remarks that he has no doubt that courts will enforce the provision in the future as in the past. It is plain that in this case the decision did not turn upon the question as to whether the amount of loss had been fixed by arbitration, because no preliminary proofs had been made, as required by the policies, so as to reach the question of difference as to the amount of loss. The case of U. S. v. Robeson, supra, is also cited by appellant. This case affirms the general rule that, where a contract provides that a certain fact—as that the transportation of certain additional freight over and above a certain quantity shall be paid for at a given rate, on producing the certificate of the commanding officer, showing the quantity of such additional freight transported—such fact must be proved by the kind of evidence required by the terms of the contract, or the party seeking to recover must show that he has made all reasonable effort to obtain such proof before he can be allowed to introduce other evidence of such fact. In such a case the contract does not contemplate that anything is to be done by the person obligated to pay, except to await the certificate of the party previously designated by both parties to ascertain and certify the quantity. The contract does not contemplate that the pay-

ing party shall do anything towards obtaining such certificate; nor is there any alternative contemplated whereby the parties may, under certain circumstances, dispense altogether with the necessity for such certificate; nor that it shall only be required in case of "differences" of opinion as to the amount in question, and then can only be brought into existence by the joint action of both parties in selecting arbitrators to ascertain the value, as in the case at bar. As remarked in the case last cited, supra: "The principles involved * * * are connected with the fiscal action of the government." If the paying agent of the government disbursed money on certificates or evidence other than such as the contract provided for, he did so at his own risk, for he was required to produce such certificates as the contract called for in accounting for his disbursements. Appellant's counsel cite, as sustaining their position upon the point under consideration, Flaherty v. Insurance Co., 7 Ins. Law J. 226 (Pa. 1878). We have not been able to examine this case, as the report cited is not at hand. Nor do we find such case in the Pennsylvania State Reports. But the holding of the supreme court of Pennsylvania, as announced by Mr. Justice Sharswood in Mentz v. Insurance Co., 79 Pa. St. 478, appears to be opposed to appellant's position. In that case it appears that the policy in question contained a provision for arbitration of differences as to the amount of loss, and that no action should be maintained on the policy unless the amount of loss "shall be first thus ascertained." "The defendants moved for a nonsuit, 'because section 8 requires the parties to the policy to submit to a reference,' etc. Plaintiff objected to the motion because no reference was offered or asked for. By direction of the court judgment of nonsuit was entered. This was assigned for error on the removal of the record to the supreme court by plaintiff by writ of error." The judgment was reversed. In the case of Hamilton v. Insurance Co., supra, it appears there was contention as to "whether defendant had duly requested and plaintiff had unreasonably refused to submit to such an appraisal and award as the policy called for." But it is remarked by Mr. Justice Gray, in delivering the opinion of the court, that the evidence upon that question does not depend in any de-

gree "on oral testimony or extrinsic facts, but wholly upon the construction of the correspondence in writing between the parties. * * * That correspondence clearly shows that the defendant repeatedly and explicitly in writing requested that the amount of the loss or damage should be submitted to appraisers in accordance with the terms of the policy; and that plaintiff as often peremptorily refused to do this, unless defendant would consent in advance to define the legal powers and duties of the appraisers (which defendant was under no legal obligation to do)." It was held that "the court rightly instructed the jury that the defendant had requested in writing, and the plaintiff had declined, the appraisal provided for in the policy, and that plaintiff, therefore, could not maintain this action." So in the case of Gasser v. Sun Fire Office, supra, differences arose as to the amount of loss, and "the defendant duly and seasonably made a written request of said plaintiff that the amount of such damage be ascertained by an appraisal, according to the terms of the contract, and demanded that the plaintiff select and name an appraiser to act for him; and that plaintiff wholly neglected and refused to comply with such request, or to enter upon any appraisal." Under such a state of facts it was held that plaintiff must comply with defendant's request for appraisement before action could be maintained for recovery of the loss. In the recent case of Insurance Co. v. Pulver, 126 Ill. 329, 18 N. E. Rep. 804, the usual arbitration clause was under consideration. Mr. Justice Bailey, in delivering the opinion of the court, says: "The instructions given enumerate, among the defenses of which the defendant was seeking to avail itself, the failure of plaintiff to submit her differences with the defendant in respect to her loss or damage to arbitration in accordance with the conditions of the policy; and on that question the jury were instructed as follows: 'As to the question of arbitration you are instructed that under the provisions of the policy, if there was a dispute as to the amount of loss, then either party could demand an arbitration to determine the amount of such loss, by serving a notice in writing on the opposite party; and before you can find against the plaintiff on this point you must believe from the evidence that there

was a dispute between the parties as to the amount of the loss, and that notice in writing was served on her, or some one authorized to act for her, demanding such arbitration in accordance with the provisions of the policy, and that she, in person or by attorney, without sufficient cause, refused to submit to such arbitration.' It is insisted that this instruction, though holding the law substantially in accordance with the defendant's theory, is erroneous in not conforming in its hypothesis to the evidence as it was actually given,—the evidence being, as is claimed, in accordance with the hypothesis of an instruction asked by the defendant." The court held that said instruction was not erroneous. In the case of Gere v. Insurance Co., 67 Iowa, 272, 23 N. W. Rep. 137, 25 N. W. Rep. 159, after suit was brought to recover the loss the insurance company demanded arbitration, under a clause in the policy providing therefor, and urged said clause and demand for arbitration as a defense. The suit was commenced five months after the loss occurred. It was held that demand for arbitration came too late, and plaintiff was allowed to proceed. In a comparatively recent case before the supreme court of Michigan (Nurney v. Insurance Co., 63 Mich. 638, 30 N. W. Rep. 352), it appears that differences had arisen between the parties as to the amount of loss. The policy in question contained an arbitration clause very much like the one in the case at bar; and, although such differences had existed, as to the amount of loss, for some five months prior to the suit, no request for arbitration had been made by either party. At the trial the defendant invoked the clause in the policy requiring arbitration, as well as another clause providing that no suit should be brought until after such arbitration was had. The trial court instructed the jury "that the plaintiff could not maintain his suit until the amount of his loss had first been determined by arbitration, or he had given notice to the defendant of his desire to have the same so determined, and the defendant had neglected or refused to comply with the request; and thereupon further instructed the jury to return their verdict for the defendant." On appeal this was held to be error, and the judgment was reversed. See other cases upon this subject:

Gibbs v. Insurance Co., 13 Hun, 611; Mark v. Insurance Co., 24 Hun, 565, affirmed in New York court of appeals, 91 N. Y. 663; Hurst v. Litchfield, 39 N. Y. 377; Wallace v. Insurance Co., 1 McCrary, 335, 2 Fed. Rep. 658; Id., 4 McCrary, 123, 41 Fed. Rep. 742; Stephenson v. Insurance Co., 54 Me. 69; Wolff v. Insurance Co., supra; Insurance Co. v. Putnam, 20 Neb. 331, 30 N. W. Rep. 246; Insurance Co. v. Badger, 53 Wis. 283, 10 N. W. Rep. 504; Reed v. Insurance Co., 138 Mass. 572; Insurance Co. v. Steiger, 109 Ill. 254; Lasher v. Insurance Co., 55 How. Pr. 318; Crossley v. Insurance Co., 27 Fed. Rep. 30; Robinson v. Insurance Co., 17 Me. 131.

Without further reviewing authorities, we conclude from the number examined bearing upon this important subject that the tendency now is to construe the provision found in contracts like the one before us, providing for arbitration as to differences respecting the amount of loss or damage, to mean, in contemplation of the parties, that the party desiring arbitration shall request the same. In view of the numerous terms and conditions of the contract, and the position occupied by the parties, we believe this is the manifest intention. Under the terms of the policy, when a loss occurs, the time for payment is fixed. Notice and verified proofs of loss are required to be presented by the assured, with other conditions as to proofs and examinations, if the insurer request them. The proofs of loss certify under oath the amount of loss as claimed by the assured. The insurer may accept this estimate, or proceed to negotiate for an adjustment or a 'mutual agreement" with the assured as to the amount he will take in satisfaction of the contract; or the insurer may give notice within the required time of intention to restore the property. All these alternatives for the insurer are provided in the policy, and it is contemplated that the assured must await the movements of the insurer upon some of these lines of action. The assured cannot know which will be adopted until notified by the insurer. The insurer may also, if a difference of opinion as to the fair amount of the loss is entertained, notify the assured thereof, and request arbitration. The insurer has the amount of loss claimed by assured, stated under oath; and the suggestion of "differences" in that respect must come from

the insurer, and such differences ought to be certain, and would probably involve the admission of liability to pay a stated amount (Lasher v. Insurance Co., 55 How. Pr. 318), so that an issue would be stated to submit to arbitration. The insurer, under such a contract, is the only party who can effectually demand and bring about arbitration or gain a defense by reason of the other party's default in failing to comply therewith, but, if the assured fails to request arbitration, this deprives the insurer of no right whatever. If the insurer is deprived of the right of arbitration, it happens by his own laches. Nor by demanding arbitration can the assured bring that remedy into action, for the insurer may simply ignore such demand, and lose no defense thereby when the cause of action is taken into court. Therefore, under the peculiar conditions of the contract, it depends on the will of the insurer alone as to whether he will have arbitration or not. If he demands it in season, according to the conditions of the policy, and the conditions are shown to exist, which the policy provides shall be submitted to arbitration, then the assured must accede to the request, for the courts will afford him no remedy until he submits to arbitration. Hamilton v. Insurance Co., supra. But, on the other hand, if the insurer is unwilling to arbitrate, he may ignore the request made by assured therefor, and, under such conditions, to require the assured to make the request, and plead and prove the fact, is to require a vain and useless act, and the ceremony of proving it, which is always against the policy of the law. An important circumstance in the case at bar is that, so far as the record shows, defendant did not at any time signify to plaintiffs a difference of opinion as to the value of said destroyed property, or the amount of damage, as claimed by plaintiffs; or that its neglect to pay said claim was on the ground of a difference of opinion from that expressed in the plaintiffs' proof of loss as to the value of said property. As appears by the record, that point was entirely lost sight of by defendant in its contention that said clause in the proof of loss referring to Ketchum & De Noille as agreed upon to estimate the value of said building should be stricken out. Upon a careful review of the record it is

found that the only expressions by defendant of dissatisfaction as to the stated value of said property was a remark by defendant's agent to one of the assured "that the figures seemed rather high," referring to the estimate by Ketchum & De Noille. That was before proofs of loss were made and delivered, and the evidence is produced by plaintiffs. The defendant produced no evidence of having signified to plaintiffs a difference of opinion as to the value of the property destroyed from that expressed in plaintiffs' proof of loss. We therefore hold that plaintiffs were not bound to show an appraisal or an award as to the amount of damages sustained; nor were plaintiffs bound to show that they had requested arbitration, and that failure to arbitrate was not through their default.

It is contended by counsel for the appellant that the court erred in instructing the jury to the effect that, if the jury found that plaintiffs were entitled to recover any sum, they were also entitled to interest thereon at the rate of 10 per cent. per annum from and after the expiration of 60 days after proof of the loss was delivered. By the terms of the policy the loss was payable 60 days after proof thereof. At that time the amount of loss became due. We think interest was legally allowable, under our statute, as well as the authorities in such cases. Comp. St. div. 5, § 1237; Albion Lead Works v. Citizens' Ins. Co., 3 Fed. Rep. 197; Hastings v. Insurance Co., 73 N. Y. 141; Field v. Insurance Co., 6 Biss. 121; Insurance Co. v. Gould, 80 Ill. 388; Insurance Co. v. Myer, 93 Ill. 271.

The further assignments of error by appellant's counsel have been carefully considered; but none of them are sustained. The assignments of error not specifically treated appear to be based upon the theory of defense set up by defendant, which we have not sustained. It is ordered that the judgment of the trial court be affirmed with costs.

HOME FIRE INS. CO. v. BEAN.

Supreme Court of Nebraska. Nov. 8, 1894. 42 Neb. 537.

Demand for Arbitration.

Harrison, J. The petition filed in this case in the district court of Thayer county alleged for a cause of action against the Home Fire Insurance Company of Omaha that the plaintiff therein, Mrs. R. J. Bean, was on the 6th day of April, 1891, the owner of a certain hotel building in the village of Davenport, in Thayer county, and procured on said day a policy of insurance, No. 51,277, to be issued to her by the company, by which she was insured against loss or damage by fire to the hotel building in the sum of $1,200; that the building was afterwards damaged by fire, and the company paid the sum of $88.45 in full settlement of such damage on October 15, 1891, and was duly credited therefor on the policy, reducing the amount to the sum of $1,111.85, for which it remained in force from and after October 15, 1891; that on November 14, 1891, the building was totally destroyed by fire, of which the plaintiff (defendant in error) gave the company notice and proof, and demanded payment of the loss, and has duly performed on her part all the conditions of the policy of insurance; that the company demanded, in writing, arbitration of the loss, and after arbitrators had been chosen withdrew the name of its arbitrator, but continued negotiations for settlement, and subsequently demanded that a new board of arbitrators be appointed to fix the amount of the loss; that the building was, when burned, of the value of $1,700, and there was no other insurance thereon. The prayer of the petition was for judgment in the amount of $1,111.85 and interest at 7 per cent. per annum from November 16, 1891, and the allowance of a reasonable attorney's fee and other costs. To this petition there was filed, for the company, the following answer: "(1) The defendant admits that it is a corporation, as alleged in the plaintiff's petition; admits that on the 6th day of April, 1891, it issued to the plaintiff its policy of insurance covering the property described in

plaintiff's petition; admits that on the 15th day of October, 1891, it paid the plaintiff the sum of eighty-eight and 45-100 dollars ($88.45) in full settlement for damages caused to the property covered by said policy by fire on October 9, 1891; admits that said payment reduced the amount of said policy to the sum of one thousand one hundred and eleven dollars and fifty-five cents ($1,111.55); and denies each and every other allegation in plaintiff's petition contained. (2) As a further defense to the plaintiff's action the defendant alleges that the amount of the defendant's liability under and by virtue of said policy was, by the terms and conditions of said policy, limited to three-fourths the actual cash value of said property covered by said policy at the time of the fire. And this defendant alleges that the actual cash value of said property at the time of said fire did not exceed the sum of $1,000. (3) Defendant further alleges that said policy of insurance contains the following conditions and agreements, namely: 'If differences of opinion arise between the parties hereto as to the amount of loss or damage, that question shall, at the written request of either party, be referred to two disinterested and competent men, each party to select one, who shall ascertain, estimate, and appraise the loss or damage; and, in case of disagreement, the two so chosen to select a third, who shall act as an umpire on disputed points only. And their award, in writing, duly sworn to, shall be binding on the parties hereto as to the amount of said loss or damage; but no appraisal or agreement for appraisal shall be construed as evidence of the validity of said policy or the company's liability thereon. And each party to pay their own appraiser's and one-half the umpire's fee.' (4) The defendant further alleges that, in accordance with said agreement and conditions contained in said policy, the defendant, after said fire, in writing, notified and requested the plaintiff to submit the differences of opinion between the plaintiff and this defendant in relation to the amount of loss or damage which the plaintiff had sustained to two disinterested and competent men, in accordance with the terms of said policy, to ascertain, estimate, and appraise the said loss or damage, and requested the plaintiff to notify this defendant of the person whom

the plaintiff had selected to act as appraiser in that behalf; that thereupon the plaintiff did select an appraiser, and notified this defendant of said fact, whereupon this defendant selected one F. W. Hollingsworth, of Davenport, Nebraska, to act as its appraiser, and notified the plaintiff of the fact; that within a few days thereafter, and before any step had been taken by the plaintiff or defendant or by the appraisers so appointed to make any appraisement of said loss or damage, this defendant was informed that the said Hollingsworth was not a disinterested appraiser, whereupon the defendant at once, on the 11th day of January, 1892, notified the plaintiff in writing that this defendant withdrew the name of F. W. Hollingsworth to act as its arbitrator, and that it would within a reasonable time appoint another person to act as its arbitrator as aforesaid; that three days afterwards, to wit, on the 14th day of January, 1892, this defendant notified the plaintiff that it had selected one Joseph Williams to act as its appraiser, instead of said Hollingsworth; that two days later, to wit, on the 16th day of January, 1892, this defendant appeared at Davenport, Nebraska, with said appraiser, and notified the plaintiff that it was ready and willing to proceed at once to said appraisement, but the plaintiff, in violation of the terms, conditions, and agreements contained in said policy, failed, neglected, and refused to proceed with the appraisement; or to enter into any agreement for any future day upon which to appraise said loss or damage, if any, to said property; that subsequently thereto, to wit, in the latter part of January, 1892, this defendant again demanded of the plaintiff an arbitration of said loss and damage to said property, but the plaintiff again refused to enter into said appraisal. And the plaintiff has at all times since the said date refused to enter into any appraisement or arbitration of the amount of loss or damage which the plaintiff may have sustained by reason of said fire, by means whereof the defendant has been unable to ascertain or determine the actual amount of said plaintiff's loss or damage by fire under said policy; but the defendant is informed and believes that the actual loss and damage sustained by the plaintiff under said policy does not exceed the sum of one thousand dollars.

($1,000) and that by the terms of said policy the defendant would not in any event be liable for more than three-fourths of said amount, to wit, the sum of seven hundred fifty dollars ($750). But the defendant alleges that by reason of the failure and refusal of the plaintiff to have the loss and damage by said fire appraised, as required by said policy, prior to the commencement of this suit, said suit was at the time of its commencement premature. (5) The defendant further alleges that the said policy of insurance contains the following agreements, restrictions, and limitations, to wit: 'XVIII. No suit or action of any kind against this company for the recovery of a claim under this policy shall be sustained in any court of law or chancery until after an appraisement and award shall have been made, if requested, fixing the amount of such claim in the manner above provided.' (6) The defendant further alleges that no appraisement or award has been made, fixing the amount of plaintiff's claim under said policy, although the same has been requested in writing by the defendant, as hereinbefore set forth. Wherefore the defendant prays that the plaintiff's action be dismissed, and the defendant recover its costs." There was then filed for Mrs. Bean what was styled "a reply," but which was in fact a general demurrer to the second, third, fourth, fifth, and sixth paragraphs of the answer. This was on hearing sustained, an exception to the ruling was taken by counsel for the company, and the company declined to plead further. A jury was waived and the case tried on its merits and submitted to the court, and at a subsequent date during the same term the court made a finding in favor of Mrs. Bean, and that there was due her from the company the sum of $1,162.75, and allowed the further amount of $60 as an attorney fee. Motion for a new trial was filed on behalf of the company, which was overruled, and judgment was rendered in accordance with the findings. The company brings the case here for review.

It is argued by counsel for plaintiff in error that inasmuch as the company, in its answer, had denied that the loss was total, the defendant in error should not have been allowed to prove a waiver of the proofs of loss unless it was alleged

in the petition or the reply, and that it was not alleged in either; that there was no evidence that proofs of loss were furnished, and hence the defendant in error was not entitled to recover, and the judgment should be reversed and a new trial awarded. The petition contained the following allegation: "That the defendant company demanded an arbitration of said loss in writing, and after arbitrators had been chosen said defendant withdrew the name of its arbitrator, but continued negotiations for settlement, and subsequently demanded a new board of arbitrators be appointed to fix amount of said loss." This was certainly a sufficient statement of a demand for arbitration, and was followed by proof of the fact. This was a sufficient pleading of the waiver of the proofs of loss, and amply supported by the evidence, and relieves this branch of the case of the objections urged against it. Both pleadings and evidence showed a waiver of proofs of loss. Where arbitration is demanded, it is a waiver of the proofs of loss. Walker v. Insurance Co. (Kan.) 33 Pac. 597, and cases there cited. Another assignment is that it was error to sustain a demurrer to certain portions of the answer, and thus strike them from the answer or exclude them from the issues. The petition pleaded the issuance of the policy, gave its number, and made it a part of the petition. The answer admitted the issuance of the policy and denied that the loss was total. Under this condition of the pleadings, if the company had proved that the loss was not a total one, it would have been entitled to the benefit of all the provisions of the policy, as they were pleaded and admitted to exist. The issuance and existence of the policy in its entirety had been pleaded by one party and admitted by the other, and had thus become a part of the case without further proof. Referring to that portion of the answer in which the demand for arbitration is alleged, and the further complaint that by reason of fault on the part of defendant in error the arbitration was not made, and that, this being a condition of the policy upon the fulfillment of the requirements of which the company was entitled to insist, hence the suit was prematurely brought, and the contention that it was error for the court to sustain a demurrer to the part of the answer in which this was pleaded,

we think the action of the court was not erroneous, as this court has decided that such provision in the policy was void. See Insurance Co. v. Etherton, 25 Neb. 505, 41 N. W. 406, and cases cited. It is next claimed that the court erred in finding for the defendant in error for the full amount for which the suit was brought. The policy upon which the action was based stated that, "in consideration of forty-two dollars, do insure Mrs. R. J. Bean against loss or damage by fire to the amount of twelve hundred dollars ($1,200). * * * Other insurance permitted, not to exceed three-fourths of the actual cash value of the property. In case the amount of insurance exceeds three-fourths of the actual cash value at the time of the fire, this company shall be liable for its pro rata share of three-fourths of the actual cash value of said property." It might be said here that probably the part of the policy in which the above statement appears, limiting, under the condition set forth, the liability to a share of the cash value only, refers to a loss where there is other insurance on the property; but it is contended by the counsel for the company that it applies to all cases, and to the case at bar in the adjustment of the loss between the insurer and insured. In this we cannot agree with counsel. Our statute on this subject (see Comp. St. 1893, §§ 43, 44, p. 536) not only states that where the property shall be wholly destroyed the amount written in the policy shall be taken conclusively to be the true value of the insured property, but that it shall also be the true amount of the loss and measure of damages. To give to the provision of the policy we have quoted the force and effect claimed for it would be in direct conflict with the provision of our statute. This portion of the policy was invalid, and could not be enforced. The judgment of the district court is affirmed.

ERIE BREWING CO. et al. v. OHIO FARMERS' INS. CO.

Supreme Court of Ohio. Oct. 19, 1909. 81 O. St. 1.

Effect on Mortgagee.

Price, J. (after stating the facts as above.) While the action under review was brought by Bridget Corrigan (now Bridget Cullen), who is one of the plaintiffs in error, it is developed in the record that her interest in the results of the litigation is not in dispute, inasmuch as the controversy is waged between the insurance company and the Erie Brewing Company, the holder and owner of the mortgage set up in its answer and cross-petition. In her petition she counts on her ownership of the insured property, pleads and sets out the policy of insurance, and alleges generally that she performed all the conditions made incumbent on her to be performed by the terms of the policy, and that after receiving due proofs of loss and damage by fire the insurance company refused to pay such loss and damage. Her prayer for recovery is for the full amount of the policy, $1,750. Nothing is said in the petition about a mortgage clause, and the Erie Brewing Company is made a party because it claims some interest in the insured property by reason of a mortgage on the same, and nothing is said about any difference between her and the insurance company as to the amount of loss and damage, and nothing about an appraisal and an award. The Erie Brewing Company in its answer and cross-petition sets out its ownership of the mortgage and note secured thereby, which ownership came by assignment from Bridget Gaffney, the mortgagee. The terms and conditions of the mortgage are alleged, as well as the substance of the policy of insurance issued by the Ohio Farmers' Insurance Company, and the so-called "mortgage clause" is copied as part of said answer and cross-petition. This clause appears in the statement made of the case preceding this opinion. It is alleged, that the building insured was damaged to the extent of $2,449.20, for the one-half of which (there being concurrent insurance) it prayed judgment. Nothing is said in this pleading about a difference between the

insured and the company as to the loss or damage, and nothing as to the proofs of loss having been made by any one, and nothing as to any demand for an appraisal of the loss; it being assumed by the pleader, as we suppose, that these were acts to be done by the mortgagor, a neglect of which by the mortgagor, according to the terms of the mortgage clause, would not invalidate the insurance.

When we look to the amended answer of the insurance company to the cross-petition of the brewing company, we find it pleading so much of the policy as provides that it was agreed therein by the insured and the insurance company that, in the event of disagreement as to the amount of loss, the same should be ascertained by two competent and disinterested appraisers, the insured and the insurance company each selecting one, and that the two so chosen first select a competent disinterested umpire; that these appraisers should estimate and appraise the loss, and they, failing to agree, should submit their differences to the umpire. The award in writing of any two shall determine the amount of such loss. It is alleged that the insured and the insurance company did differ as to the amount of the loss and damage on the insured building, and that on May 3, 1904, this company and the company issuing the concurrent insurance agreed in writing with the insured to submit the question of loss and damage to certain appraisers, which was done after the selection of an umpire, and that the award made in pursuance of the terms of the policy was in the sum of $1,202.05. This award was reduced to writing, and that the insurance company was not liable for more than one-half of said award. It is not averred in this defense that the owner of the mortgage, the Erie Brewing Company, had any notice or knowledge of the differences between the insured and the insurance company as to the amount of the loss, or that the brewing company had notice or knowledge of the time and place of the appraisal and award. It is not averred that it was present or took part in said submission and appraisal. The court of common pleas sustained a demurrer to this defense, which judgment the circuit court reversed, and that ruling gives rise to the principal controversy in this proceeding.

Is the appraisal and award thus made binding on the owner

of the mortgage where such owner does not assail the award for fraud or collusion? We find the authorities are not in harmony on the question. The decided cases are in serious conflict; but many of them adjudicate controversies unlike the one before us, while others are more directly in point. The legal status of the so-called "mortgage clause" has been differently defined by courts and text-writers, some of which hold that it is a new and independent contract, not controlled necessarily by all the provisions of the policy, while others hold that such clause is a designation or appointment of the mortgagee as the party to share in or receive the amount of the loss and damage. It must not be overlooked that there was no assignment of the policy in this case. There was no assignment in terms of any part of it. The clause designates a payee to receive the fruits of the policy—fruits that will accrue by reason of its protection and the rights secured thereby by the express language of the policy. There is nothing in it concerning differences between the company and mortgagee as to the amount of loss and damage, and nothing making it incumbent upon the mortgagee to furnish proof of loss. The clause in question is careful to provide, "and this insurance as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within-described property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this policy; provided, that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee shall on demand pay the same. Provided also, that the mortgagee shall notify this company of any change of ownership or occupancy or increase of hazard which shall come to the knowledge of said mortgagee, and unless permitted by this policy, it shall be noted thereon and the mortgagee shall on demand pay the premium for such increased hazard for the term of use thereof, otherwise this policy shall be null and void."

It seems that clause expresses what will not invalidate the policy as to the mortgagee, and creates an obligation on his part, if he have knowledge of change of ownership or oc-

cupancy, or increased hazard, to notify the insurance company of the same, and, if the hazard is increased by the change, the premium for the increased hazard shall on demand by the company be paid, or the policy be void. In all other respects, not excepted by the clause, the rights of the mortgagee depend on a compliance with the terms of the policy by the insured mortgagor. The premium is due from the insured, and only where he neglects to pay it may the insurer demand its payment of the mortgagee. In this language it is to be further observed that the clause does not vest in the mortgagee any additional title or interest in the insured property, for it says: "Loss or damage, if any, under this policy shall be payable to the Erie Brewing Company as mortgagee as interest may appear, and this insurance as to the interest of the mortgagee only therein shall not be invalidated," etc.

It would appear reasonable that, in respects not modified or limited by the express language of this mortgage clause, the plain provisions of the policy as between the insured mortgagor and the insurance company must prevail and be observed. The rights conferred by the clause spring from the contract relation which the mortgagor sustains to the company, and, but for saving words in the clause, the neglect or default of the insured might defeat the interests of both. Here we have in the policy the unequivocal provision that: "In event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine such loss." This is a part of the body of the policy, and it has been uniformly held that a compliance with the conditions is a prerequisite to recovery on the policy, and this mortgage clause, although on a separate paper, is of same date as the mortgage and attached to the policy at the time of its execution. Hence it was not intended to be a new and separate contract between the insurance company and the mortgagee, but to designate or appoint the

payee of the amount of loss according to the interest in, not the property insured, but in the insurance which he may make appear. Such clauses, for convenience perhaps, are not contained in the forms of the principal contract of insurance between the insured and the company, but prepared on a separate sheet in order that in a proper case it may be attached, and, when this is done, it does not waive or destroy any express provision of the policy, but serves its purpose by designating the payee when loss occurs and modifies the principal contract only to the extent that a modification or qualification is clearly expressed therein.

This view leads to the conclusion that the principal contract must be observed, except as expressly modified, and that the rights of the mortgagee depend upon and must be worked out through the relation the insured sustains to the insurance company; that relation being one of solemn primary contract. Therefore an arbitration was in order where the principal parties could not agree. There is no provision in the mortgage clause that recognizes his right to select or be present when an appraiser is selected. That method of determining the loss is fixed in the policy and remains there after the mortgage clause is attached, and there is nothing in it which in any degree qualifies the authority for appraisal existing between the principal parties; and surely there could not be two appraisals, one according to the policy between the insured and the insurance company, and another at the behest of the mortgagee. There is nothing in the mortgage clause that provides notice of appraisal to the mortgagee. Two appraisals might not be for the same amount, and the situation would be unique.

The present question, as we are now advised, has not heretofore been passed upon by this court; but our views find support in several well-considered cases decided in other jurisdictions. In Fogg et al. v. Middlesex Mutual Fire Ins. Co., 10 Cush. (Mass.) 337, 346, it is held an indorsement on a policy of insurance, "for value received, pay the within, in case of loss, to F. and H.," made to a purchaser of the property insured, is rather an order of or assignment of a right to the money in case of loss, than a regular transfer of the contract of insurance. After discussing other forms of assignment of

insurance, Shaw, C. J., says: "But there is another species of assignment or transfer it may be called, in the nature of an assignment of a chose in action. It is this: 'In case of loss, pay the amount to A. B.' It is a contingent order or assignment of the money, should the event happen upon which money will become due on the contract. If the insurer assents to it, and the event happens, such assignee may maintain an action in his own name, because, upon notice of the assignment the insurer has agreed to pay the assignee instead of the assignor; but the original contract remains. The assignment and assent to it form a new and derivative contract out of the original; but the contract remains as a contract of guaranty to the original assured. He must have an insurable interest in the property and the property must be his at the time of the loss. The assignee has no insurable interest prima facie in the property burnt and does not recover as the party injured but as the assignee of a party who has an insurable interest, and a right to recover, which right he has transferred to the assignee, with the consent of the insurer." The same view is adopted by the same court in Minturn v. Manufacturers' Insurance Co., 10 Gray (Mass.) 501.

In Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391, it is held that: "Where a fire policy names the owner of the property as the one insured, and declares the damages in case of loss to be payable to another person therein named as mortgagee, the latter cannot recover in case of a breach of the conditions of the policy by the mortgagor. In such case, the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only where the mortgagor could have done so, had the money been payable to himself instead of being payable for his benefit to the mortgagee." In Hathaway v. Orient Ins. Co., 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514, the preceding case, with others, was considered and distinguished; but its doctrine was not overruled.

Atlas Reduction Co. et al. v. New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21, 9 L. R. A. (N. S.) 433, is a leading case decided by the Circuit Court of Appeals of the United States. The substance of the holding is that where an indorse-

ment was made on a policy of fire insurance, by the agents of the insurer, at the request of the insured, to wit: "Subject to all the conditions of this policy, loss, if any, payable to D. and S. as their interests may appear"—the indorsement must be read in the light of the purpose which actuated the parties in stipulating that the policy could be modified, or any provision thereof waived, only by a writing of equal dignity and credit with the policy itself." Such an indorsement is a common mode of furnishing a species of security by a debtor to his creditor, who may be willing to trust to the debtor's honesty, etc., but who requires some indemnity against such accidents as loss by fire, and it does not create a new contract of insurance with the payee, or abrogate or waive any condition of the policy. The terms of the indorsement are not conflicting, but consistent and plain, and their purpose and effect are to make D. and S. the simple appointees of the insured to receive payment of any loss payable to the insured under the policy, and to receive it, not absolutely, but to the extent of any interest they may have in such payment at the time of the loss. The words, 'as their interest may appear,' are plainly prospective, and refer to the interest, not in the property insured, but in the payment of the loss." That court was somewhat divided on some questions in the case, but we think not on the proposition above stated.

We content ourselves with consideration of another case, although others are cited in brief for defendant in error. In Chandos et al. v. American Fire Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321, omitting part of the syllabus, we quote from the third section: "A mortgagee to whom the insurance is made payable 'as her interest may appear' is bound by the appraisement or award, although she was not a party to and had no notice of the proceedings." The opinion of the court is a thorough discussion of this and other subjects and is valuable for the array of authorities cited. On page 191 of 84 Wis., on page 392 of 54 N. W. (19 L. R. A. 321), the court says: "That the mortgagee was not a party to the appraisement, and had no notice of it, is an objection of much more importance. All of the insurance policies contain the same direction of 'loss payable to Louisa W. I. Goff, the mortgagee, as

her interest may appear.' To determine whether she was entitled to all the insurance, all of the policies of insurance must be considered together as one policy and at the time the loss occurred, and not since it has been determined in this case whether the loss is less or more than the mortgage. To determine the question whether the mortgagee ought to have had notice of the appointment of appraisers, and to have been a party to the appraisement, it is important to know whether at that time it appeared that she was entitled to the whole insurance. Nearly all, if not all, the authorities cited by the learned counsel of the respondents, which hold that the mortgage is the sole party in interest in the insurance, and must be represented in the arbitration or other adjustment of the loss, are cases where the direction is to pay the whole insurance to the mortgagee or other third person, who thereby becomes the assignee of the policy and loss. In this case it could not be known what interest the mortgagee might have in the insurance, or what interest in her might appear. First, her interest was not commensurate with the insurance; second, it was not known what part, if any, of the mortgage would remain unpaid by the mortgagor. It was therefore uncertain what interest the mortgagee had, if any, in the insurance. She (the mortgagor) was the owner of the property and of the equity of redemption in the mortgaged premises. It follows that, in all cases where the language of direction is that the insurance should be paid to the mortgagee 'as his interest may appear,' the assured mortgagor remains the responsible party, or the party in interest to control the insurance and the adjustment of the loss. This is the distinction, as I understand it, which divides the authorities on the question."

The logic applies to the case at bar, for the policy and clause under consideration was not an assignment of all the insurance, nor of the insurance policy. The insurance given by this policy is $1,750, and concurrent insurance in same amount, $3,500. The mortgage debt at date of the policy was less than $2,500. The sound value of the insured property, as fixed by the appraisal, was $4,000, and the loss $1,202.05.

There are some cases that seem to hold contrary to our views, and they are cited for plaintiff in error in its brief. We

have examined these cases, but have not space for their discussion here.

We concur in the decision of the circuit court, and affirm its judgment.

Judgment affirmed.

In the Matter of Arbitration Between WRIGHT and POLE.

King's Bench, 1834. 1 Ad. & E. 621.

What Property Insured.

Charles Wright, proprietor of the Ship Inn at Dover, effected an insurance, as after-mentioned, with the Sun Fire Office Company. In November, 1832, a fire broke out on the insured's premises, and Wright claimed compensation from the company for the loss thereby occasioned. His claim being objected to, the parties, by deed (which was afterwards made a rule of court) referred the dispute to arbitration. It appeared before the arbitrator that, by the policy of insurance, Wright and another (his partner when the policy was signed), had insured, among other things, "on their interest only in the said Ship Inn and offices, £1,000." By virtue of this clause, Wright made the following demand before the arbitrator: "Also such damages as he can satisfy the arbitrator he has sustained under the claim delivered to the Sun Fire Office for his loss in his interest in the said Ship Inn and offices; such damages consisting in rent paid by him to his landlord, J. M. Fector, Esq., the hire of other houses or apartments whilst the apartments damaged in such inn by the fire were undergoing the necessary repairs, and the loss or damage sustained by him by reason of various persons refusing or declining to go to the said Ship Inn whilst the apartments so damaged were undergoing such repair." It was objected that this claim was not maintainable, for that the interest insured could be understood only to mean the interest Wright had in the fabric of the inn and offices, by reason of the improvements and additions proved to have been made thereto by him, and by his

father, through whom he derived title to the premises, and that in respect of that interest he had no claim, the inn and offices having been reinstated in pursuance of the policy, as Wright admitted. The arbitrator awarded that £450 was due from Charles Pole, as one of the managers or directors of the Sun Fire Office Company, to the said Charles Wright, "for the loss he has sustained in his business as an innkeeper, by not being able to occupy the said Ship Inn and offices during the time that elapsed between the fire and the rebuilding of the said premises." He also awarded a sum for loss on goods. A rule nisi having been obtained for setting aside the award.

R. V. Richards now showed cause. The insurance was effected on Wright's "interest in the Ship Inn," and it was for the arbitrator to say what that interest was, and whether there was a loss in respect of it. (Lord Denman, C. J. Do you contend, that if he had carried on business at another inn while his own premises were rebuilding, and had gone on there so successfully as to be no loser during that period, he would have had no claim now in respect of interest, but that, if less successful, he might have claimed in proportion?) The question would always have been for the arbitrator, whether there was a loss within the meaning of the policy. The profits of the business were clearly insurable. (Lord Denman, C. J. The question is, whether they are covered by the insurance actually effected.) In Crowley v. Cohen, 3 B. & Ad. 478, Lord Tenterden said that, in a policy of insurance, "although the subject-matter of the insurance must be properly described, the nature of the interest may in general be left at large." Littledale, J., makes a similar observation; Parke, J., says, "The particular nature of the interest is a matter which only bears on the amount of damages; it is never specially set out in a policy;" and Patteson, J., adds: "It is only necessary to state accurately the subject-matter insured, not the particular interest which the assured has in it." In Flint v. Flemyng, 1 B. & Ad. 45, it was held that a shipowner, on an insurance of freight, might recover for the profits which he would have made by carrying his own goods. (Taunton, J. The profits were of the same nature, whether he carried his own goods or those of another.)

Kelly, contra, on stating that he should not dispute the award on any point but this, was stopped by the court.

Lord Denman, C. J. We all thing the case quite clear on this point. The interest in question might have been the subject of insurance, but an arbitrator cannot take into consideration the possible profits of an inn, under the shape of an interest in buildings.

Littledale, J., concurred.

Taunton, J. If a party would recover such profits as these, he must insure them qua profits. I never heard before of a recovery of profits of a business as an incidental part of the loss under an insurance upon a house or ship.

Williams, J., concurred.

Rule absolute for setting aside the disputed part of the award.

GERMAN INS. CO. OF FREEPORT et al. v. EDDY.

Supreme Court of Nebraska. 1893. 36 Neb. 461.

Valued Policies.

Action by Ambrose Eddy against the German Insurance Company of Freeport, Ill., on a fire insurance policy. Same against the Queens Insurance Company of Liverpool, Eng. Same against the German Fire Insurance Company of Peoria, Ill. The cases were tried as one case, and one record was made, applicable to each of the cases. There was judgment for plaintiff, and, defendants' motion for a new trial being overruled, they bring error. Affirmed.

Maxwell, C. J. The above cases were tried together in the court below, and a verdict rendered in favor of the defendant in error against the German Fire Insurance Company of Peoria, for $1,824.46, against the Queens Insurance Company for $1,037.23, and the German Insurance Company of Freeport for $912.22; all of said verdicts with interest from date of loss. The petition in each case alleges a total loss. The answer admitted the execution of the policies, and the liability of

the companies thereon, but alleged, in avoidance, that the policies provided that, "in the event of a disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the assured and this company each selecting one, and the two so chosen shall first select a competent and distinterested umpire; and the award in writing of any two shall determine the amount of such loss." And the said policies each further provided that "no suit or action on this policy shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements." That there was "disagreement as to the amount of loss," and a demand by the insurance companies, in due time, that the question as to the amount of loss be submitted to arbitrators. That the demand was acceded to on July 3, 1890, and an arbitrator selected by each party on that day, and that, therefore, the actions were prematurely brought, they having been instituted while the arbitrators were acting, and before they made an award, and that on September 12, 1890, two of the arbitrators made an award fixing the amount of loss at $1,500, and no more. The reply is as follows: "That he denies each and every allegation in said answer contained except as hereinafter specifically admitted. He admits that on the 3d day of July, 1890, there was an agreement by and between the parties hereto that the amount of the loss sustained by the plaintiff in said fire should be submitted to arbitration, as provided in the policy herein sued on; that the plaintiff chose the said Royer and the defendant chose the said Harte to act in the said arbitration. Plaintiff further alleges that from that time he and the one he so chose, the said Royer, used their best efforts to have the said appraisal and arbitration made as provided in the said policy, but alleges that they were not able to get the said Harte to act with them, and alleges that the said Harte neglected and refused to act in said arbitration for more than the space of 30 days thereafter, although often requested so to do. That by reason of the refusal of the said Harte to act in said arbitration, and the failure of the said Harte and the said Royer to make any appraisal of the said loss in said fire for more than the space of 30 days, the said loss was never arbitrated and deter-

mined under the said policy, and in accordance with the provisions therein contained, and that after having waited for more than 30 days after the said Harte and Royer had been chosen as herein set forth, and they having failed in any way to act upon said loss, or to set a time when they would act thereon, plaintiff commenced this suit. That after the suit herein was begun the said defendant came to the plaintiff, and requested that the whole of the matters in dispute involved in said loss and in the suit might be submitted to the said Harte and the said Royer, and to one to be selected by them, who should act in case of their disagreement. That at that time, to wit, on the 21st day of August, 1890, it was agreed between the parties herein that said arbitration should take place on that day, to wit, on the 21st day of August, 1890. That in pursuance of the said agreement, and not under the stipulations of the policy, the said Harte and the said Royer agreed upon the said Gray to act with them in the said arbitration. That, after the said Gray had been so chosen, then the said Harte refused to act with the said Royer, and appraise the said loss, in accordance with the said agreement, and the said Harte neglected, failed, and refused to in any way go on with the said appraisal and arbitration, and said Harte never did act, or try to act, with said Royer under said agreement. That afterwards he learned, and now alleges the fact to be, that the said Harte was not a disinterested party, but that he was in the employment of the defendant, and was and is prejudiced in its favor, and against this plaintiff, and was not a proper person to choose for an arbitrator under the said policy, whereby and because of the failure of the said Harte, Royer, and Gray to act in accordance with the terms of the said agreement under which they were chosen, and because plaintiff had learned of the prejudice of the said Harte as herein alleged, the said last-mentioned agreement became null and void, and the plaintiff thereafter notified the defendant that he withdrew from all further attempts at an arbitration of the said loss, and that he should proceed at once to clear away the rubbish and ruins of the said fire, and to rebuild the house. That it was long after the said notice to the defendant, and after he had proceeded and cleared away the ruins from the

said fire, that the said Harte and the said Gray made their pretended appraisal and award of the loss incurred by the said fire, and that, when the said Harte and the said Gray made their pretended award, there was no property there for them to view. That said loss has never been arbitrated, or in any manner settled, either under or by virtue of the terms of the said policy, or by virtue of any agreement by and between the parties herein."

The first error relied upon is that the verdict is not sustained by sufficient evidence. The ground upon which this claim is made is that the proof fails to show a total loss of the property. In 1889 an act was passed as follows (Section 43, c. 43, Comp. St.): "Whenever any policy of insurance shall be written to insure any real property in this state against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured, and the true amount of loss and measure of damages. Sec. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal which shall hereafter be made of all policies heretofore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state." What is the meaning of the words "wholly destroyed," when applied to a building? If the building was constructed of brick or other non-combustible material, fire could not destroy that. Therefore the brick or other material not destroyed would have some value, which the party retaining should pay for. From the nature of the case, therefore, the words referred to do not mean the debris from a building destroyed. This may have some value, and, if so, the insurance company, if it pays the loss, is entitled to compensation for. The words, when applied to a building, mean totally destroyed as a building; that is, that the walls, although standing, are unsafe to use for the purpose of rebuilding, and must be torn down, and a new building erected throughout. Seyk v. Insurance Co. (Wis.) 41 N. W. Rep. 443. In the case cited is said: "The evidence is that all the

combustible material in the structures was destroyed, and, although portions of the brick walls were left standing, yet they were useless as walls, and many—perhaps most—of the bricks therein were spoiled by the heat. It cannot be doubted that the identity and specific character of the insured buildings were destroyed by the fire, although there was not an absolute extinction of all parts thereof. This was an entire destruction of the buildings, within the meaning of the statute. 1 Wood. Ins. § 107." There is abundant proof in the record that such was the situation of the building in the case at bar after the fire.

2. Where there is a total loss the provision for arbitration, except it may be to ascertain the value of the debris, does not apply. The provisions of the statute override any stipulations in the policy to that effect, as an insurance company can only do business in the state on the conditions provided by law. If the property was totally destroyed, therefore, stipulations in the policy as to arbitration must yield to the statute. Insurance Co. v. Leslie (Ohio Sup.), 24 N. E. Rep. 1072; Seyk v. Insurance Co. (Wis), 41 N. W. Rep. 443. The jury brought in a verdict for a small sum, less than the amount of the policy in each case, having evidently deducted the value of the brick and other material left from the burned building. Of this the companies have no cause to complain.

3. The question whether or not the building was wholly destroyed is one of fact, and it seems to have been fairly submitted to the jury. It is unnecessary to review the instructions. There is no material error in the record, and the judgment is affirmed. The other judges concur.

TILLEY v. CONNECTICUT FIRE INS. CO.

Supreme Court of Appeals of Virginia. April 10, 1890. 86 Va. 811.

Award Where Loss Exceeds Amount of Insurance.

Lacy, J. This is a writ of error to a judgment of the circuit court of Norfolk county rendered on the 25th day of March, 1889. On the 20th day of March, 1884, the defendant in error issued its policy of insurance, insuring one Sarah F. Laforme against loss or damage by fire to the extent of $3,000 on eight double tenement houses situated in the county of Norfolk. The policy provided that the loss, if any, should be paid to Edward M. Tilley, the plaintiff in error, as his interest might appear. At the time when the said policy was issued the plaintiff in error held a deed of trust on the said property to an amount greater than the said amount of the said policy. The said policy was kept alive by renewals until the 9th day of November, 1887, when the said buildings were totally destroyed by fire. The defendant in error declining to pay the loss, on the 3d day of November, 1888, the said Edward M. Tilley instituted his action on the said policy against the said defendant in error. At the trial the defendant company demurred to the declaration, and the demurrer was sustained by the said court.

The ground of the said demurrer was (1) that the action should have been brought by the said Sarah F. Laforme, and could not be maintained by the plaintiff in his own name. The declaration was in the usual form required, and contained the following: "And the said plaintiff says that before and at the time of making the said policy of insurance, and at all times since and now, the said plaintiff was and is interested in the said insured buildings in the said policy mentioned, and described as aforesaid, to a large amount, to wit, to an amount greater than the amount of the said policy, having loaned the same upon the said buildings, and the land on which the same stand, and secured the said loan on the said land and buildings by deed of trust, and the said amount, with accumulations of unpaid interest, now exceeds both the amount of the

said policy, or of the houses destroyed, and of the lot on which the same was situated; and the said buildings in the policy described, afterwards, to-wit, on the night of the 8th of November, A. D. 1887, or the early morning of the 9th day of the said month, while the said policy was still in force, were burned down and comsumed and destroyed by fire, and damage and loss were thereby occasioned to the said plaintiff to the amount of $3,000, in such manner, and under such circumstances, as to come within the stipulations, promise, and undertaking, aforesaid, of the said defendant, in the said policy contained, and to render liable and oblige the said defendant to insure the said plaintiff against loss or damage by fire to the amount of $3,000, and to make good to the said plaintiff any such loss as should happen by fire, not exceeding the last-mentioned sum of $3,000 on the buildings aforesaid in the said policy, and thereby intended to be insured," etc. That the plaintiff, under these circumstances, had an insurable interest in the property destroyed, will not be questioned. Any person who has any interest in the property, legal or equitable, or who stands in such a relation thereto that its destruction would entail pecuniary loss upon him, has an insurable interest to the extent of his interest therein, or of the loss to which he is subjected by the casualty. And it has been said that any interest, however slight, may be insured, as when A. advances money to B. in any venture, and by agreement is to be paid out of the proceeds of the property purchased, he has an insurable interest in such property to the extent of his advances. Sansom v. Ball, 4 Dall. 459; Insurance Co. v. Baring, 20 Wall. 159; Fenn v. Insurance Co., 53 Ga. 578; Wood, Ins. 483. This interest he holds immediately under the contract, and not mediately from Mrs. Laforme. The contract was made for his benefit. It was for his benefit that Mrs. Laforme was assured. If the declaration is true, and for our purposes it is true, the contract inures not only for his benefit, but for his alone, and for the benefit of no other person whomsoever; he being the sole beneficiary. It is claimed, nevertheless, that as the contract, although made for his benefit, was not made with him, he could not sue in his own name, but only in the name of the person with whom the contract was made. It is pro-

vided by law that "an immediate estate or interest in, or the benefit of a condition respecting, any estate, may be taken by a person under an instrument, although he be not a party thereto; and if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Section 2415, Code Va.; Clemmitt v. Insurance Co., 76 Va. 361. It is clear, under the statute just quoted, that the plaintiff was authorized and empowered to maintain such an action as is set forth in his declaration in his own name. There can be no serious question of this.

The second ground upon which the demurrer was sustained was that the declaration contained no allegation that there had been an award, and it is alleged that the policy filed with the declaration expressly provided that no suit should be sustainable until after an award had been obtained. The award provided for in the policy was to settle any dispute there might be as to the value of the destroyed property. It also contained a provision that unless suit should be brought within a year the right of recovery should be thereby barred. The year had nearly elapsed. No demand is alleged of an award by the company; and, if the declaration is true, the suggested award was altogether unnecessary and useless, because the declaration alleges that the loss exceeded the amount of the insurance, with the value of the land added. It would be an unreasonable construction of the policy to consider that the award might be asked for just before the expiration of the year, and thus defeat all recovery. This could not have been the intention of the contract between the parties. If there was any intention on the part of the insurer to insist upon this provision in a case where it was useless, the said insurer should have done so promptly. To have so long delayed to do this was a waiver of that provision. There was no place in the declaration for this allegation that there had been an award, nor that there had not been. The provisions, conditions, and stipulations of this policy are well-nigh interminable, covering

pages of printed matter; and for the relief of those persons situated as this plaintiff, with a claim for loss against an insurance company which repudiates its obligation for unknown causes or pretexts, and who may desire to institute his suit on the said policy, the section 3251 of the Code was enacted. It is there provided that, "in an action on a policy of insurance, if the plaintiff file the policy, or a sworn copy thereof, with his declaration, it shall not be necessary, in respect to the conditions and provisos of such policy, to set forth in the declaration every such condition and proviso, nor to allege observance thereof or compliance therewith in particulars. But, in respect to such conditions and provisos, it shall be sufficient to refer to the policy or copy, and allege in general terms the performance of all its conditions, and the violation of none of its prohibitions." The declaration avers, and the demurrer admits, "that the plaintiff and Sarah F. Laforme have performed, fulfilled, observed, and complied with each and all the conditions, provisos, and stipulations of the said policy on their part and behalf to be performed, fulfilled, observed, and complied with, and have violated none of its prohibitions, according to the form and effect, true meaning, and intent of the said policy." This is all that was required. The demurrer admits the truth of these averments, and the omission of an allegation of performance of any particular condition is immaterial, under the statute cited above.

For the foregoing reasons, we think the circuit court of Norfolk county erred in its action in sustaining the said demurrer; and its judgment aforesaid will be reversed and annulled, and the cause remanded for new trial of the same upon the merits.

GRADY v. HOME FIRE & MARINE INS. CO.

Supreme Court of Rhode Island. Jan. 26, 1906. 27 R. I. 435.

Arbitration Agreement—Validity—Action—Condition Precedent.

Johnson, J. The action was upon a policy of fire insurance which contained the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like-kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. * * * In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * * This company shall

pages of printed matter; and for the relief of those persons situated as this plaintiff, with a claim for loss against an insurance company which repudiates its obligation for unknown causes or pretexts, and who may desire to institute his suit on the said policy, the section 3251 of the Code was enacted. It is there provided that, "in an action on a policy of insurance, if the plaintiff file the policy, or a sworn copy thereof, with his declaration, it shall not be necessary, in respect to the conditions and provisos of such policy, to set forth in the declaration every such condition and proviso, nor to allege observance thereof or compliance therewith in particulars. But, in respect to such conditions and provisos, it shall be sufficient to refer to the policy or copy, and allege in general terms the performance of all its conditions, and the violation of none of its prohibitions." The declaration avers, and the demurrer admits, "that the plaintiff and Sarah F. Laforme have performed, fulfilled, observed, and complied with each and all the conditions, provisos, and stipulations of the said policy on their part and behalf to be performed, fulfilled, observed, and complied with, and have violated none of its prohibitions, according to the form and effect, true meaning, and intent of the said policy." This is all that was required. The demurrer admits the truth of these averments, and the omission of an allegation of performance of any particular condition is immaterial, under the statute cited above.

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Supreme Court of Rhode Island. Jan. 26, 1906. 27 R. I. 435.

Arbitration Agreement—Validity—Action—Condition Precedent.

Johnson, J. The action was upon a policy of fire insurance which contained the following provisions: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like-kind and quality; said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided, and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described. * * * In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * * This company shall

not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * * No suit or action on this policy, for the recovery of any claim, shall be sustained in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire." The property covered by this policy having been destroyed by fire, the parties entered into an agreement of submission to arbitration, in accordance with the terms of the policy. The arbitrators selected appointed an umpire and proceeded with the appraisal. An award in writing, dated April 23, 1902, was signed by the two arbitrators and the umpire. Subsequently one of the arbitrators erased his name and appended the following memorandum: "Signature erased a/c disagreement 5-27-'02." The defendant offered to abide by the award, although admitting its insufficiency; and, its offer in that regard being rejected, demanded a new appraisal and named its arbitrator. The plaintiff refused to submit to a new appraisal, and subsequently this action was commenced.

The declaration contained no reference to the arbitration clause of the policy, nor to the attempted arbitration under it. The defendant filed the general issue only. The parties, however, stipulated that the defendant might, under the general issue, make any defense which it might make under any plea in bar, of which the defendant should give the plaintiff notice in writing, "and especially the defense that the parties failed to agree as to the amount of loss, and therefore a determination of the amount of loss by appraisers is a condition precedent to the plaintiff's right of action and that no such determination has been made." It was admitted by the parties that the award was not in accordance with the provisions of the agreement of submission to arbitration, and was invalid.

The case was tried with a jury in the common pleas division, and at the close of the testimony the defendant moved the court to direct a verdict upon the following grounds: (1) That, upon the evidence, an appraisal in accordance with the terms of the policy is a condition precedent to the right of the plaintiff to recover. (2) That there having been an agreement for arbitration, and the arbitration having failed without the fault of either party, the plaintiff must comply with the defendant's request for a resubmission before he can maintain his action. This motion was denied, and the defendant thereupon excepted. The defendant then presented to the presiding justice requests to charge the jury as follows: "(1) By the terms of the policy the determination of the amount of the loss by arbitration is a condition precedent to the plaintiff's right to sue, and, in order to recover, it is incumbent upon the plaintiff either to aver and prove the determination of the amount of the loss in that manner, or to aver and prove facts which excuse him from procuring such determination by arbitration. (2) Where an attempt has been made by the insured and the company to have the amount of loss determined by arbitration in accordance with the terms of the policy, and the arbitration fails without misconduct on the part of the company, and the company seasonably notifies the assured that it requires arbitration in accordance with the terms of the policy and names an arbitrator, no action will lie against the company until such arbitration shall be had or shall have failed through the misconduct of the company. (3) The notice from the company to the assured that arbitration is required by it and the nomination by the company of an arbitrator as disclosed by the evidence was seasonable." The court granted the third of these requests, but refused the first and second requests, and the defendant excepted. The jury returned a verdict for the plaintiff for $960.83, and the case is now before us on the defendant's petition for a new trial upon the grounds of the refusal of the presiding justice to direct a verdict for the defendant, and his refusal to direct and charge the jury in accordance with the first and second requests above quoted.

It is well settled, both in this country and in England, that

a stipulation in a contract providing that all controversies and disputes which may subsequently arise between the parties shall be settled by arbitration is invalid because its effect would be to oust the courts of their jurisdiction. It is, however, equally well settled that if the arbitration agreement relates only to some preliminary matter, such as the ascertainment and determination of the amount of damages to be recovered, and does not apply to the whole question of liability, such an agreement providing a reasonable and definite method for choosing arbitrators is valid and enforceable. Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419; Scott v. Avery, 5 H. L. Cas. 811; Chippewa Lumber Co. v. Ins. Co., 80 Mich. 116, 44 N. W. 1055; Fisher v. Merchants' Ins. Co. (Me.) 50 Atl. 282, 85 Am. St. Rep. 425; Wolff v. Ins. Co., 50 N. J. Law, 453, 14 Atl. 561; Levine v. Ins. Co., 66 Minn. 138, 68 N. W. 855; Seibel v. Lebanon Mut. Ins. Co., 16 Lanc. Law Rev. 356; Westenhaver v. Ins. Co. (Iowa) 84 N. W. 717; Viney v. Bignold, 20 Q. B. D. 172; Del. & Hud. Canal Co. v. Penn. Coal Co., 50 N. Y. 250; Reed v. Washington Ins. Co., 138 Mass. 572, 576; Hall v. Norwalk Ins. Co., 57 Conn. 105, 114, 17 Atl. 356. See, also, Brown v. Roger Williams Ins. Co., 5 R. I. 394, 401, 402. Furthermore, the policy in this case was in the standard form prescribed by chapter 183, p. 578 of the General Laws 1896; and, even if the validity of such a stipulation were less strongly supported by the authorities, it could not well be argued that a contract made in the express terms required by the statute was void as against public policy. A provision in a contract that preliminary matters about which differences may arise between the parties shall be determined by arbitration may go to the extent of making such determination a condition precedent to a right of action upon the contract, or may be simply a collateral and independent agreement which will not be a bar to an action on the principal contract, but would be a basis for a separate action in case of breach.

In Fisher v. Merchants' Ins. Co. (Me.) 50 Atl. 282, 283, 85 Am. St. Rep. 425, the court says: "The general principle is, as decided in Roper v. Lendon, 1 El. & El. 825, that such

a condition in a contract to refer any question which may arise out of the contract will be, if so stated, a condition precedent to the right to sue on the contract; but, unless the condition expressly stipulates that until arbitration had no action shall be brought, its performance is not precedent to the right to sue on the contract. * * * And it is settled beyond controversy that, when the contract provides that no action upon it shall be maintained until after such an award, then the award is a condition precedent to the right of action." In Hamilton v. Liverpool, etc., Ins. Co., 136 U. S. 255, 10 Sup. Ct. 949, 34 L. Ed. 419, Mr. Justice Gray, speaking to this very point, says: "Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general question of liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is unquestionably valid, according to the uniform current of authority in England and in this country. * * * The case comes within the general rule long ago laid down by this court: 'Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so.' U. S. v. Robeson, 9 Pet. (U. S.) 319, 327, 9 L. Ed. 142."

In the contract before us the parties have stipulated that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required," and also that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." These provisions clearly constitute a condition precedent to the right of action. Hamilton v. Liverpool, etc., Ins. So., supra; Fisher v. Mer-

chants' Ins. Co., supra; Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; Reed v. Washington Ins. Co., supra; Hutchinson v. Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Levine v. Insurance Co., supra; Westenhaver v. Ins. Co., supra. A valid agreement, therefore, having been made by the parties that in case of loss no action shall be sustainable until the amount of loss has been first ascertained in the manner provided in the policy, the question arises whether the attempted arbitration, which it is admitted failed without the fault of the defendant, was such a compliance with the contract as will permit the plaintiff to maintain this action, which is brought to recover, not the award contemplated by the contract, but such loss or damage as he has sustained irrespective of the award. We think that it clearly is not. If the arbitration had failed through the fault of the defendant, the case would be different. There is, however, no allegation that the defendant was at fault in the matter or that arbitration had become impossible. This very question was decided in Fisher v. Merchants' Ins. Co. (Me.) 50 Atl. 282, 85 Am. St. Rep. 425, in which the court said (page 284): "A determination by arbitration of the amount of loss having been especially made by the parties a condition precedent to any right of action for recovery of damages for the loss, it was incumbent upon the plaintiff to prove performance or a valid excuse for nonperformance. An ineffectual attempt to perform is not a compliance with such a condition in a contract, when no reason is shown why there should not have been full performance. If the award of the arbitration was invalid, as claimed by the plaintiff, for the reasons set out in the amended declaration, it was the duty of the plaintiff to seek a new determination of the amount of his loss in the manner provided by the contract. The action in such a case is upon the policy, but the damages recoverable are such as have been previously ascertained and determined by the arbitrators, unless the plaintiff shows some sufficient reason why such a determination could not have been obtained. Consequently there can be no action until performance of the condition or excuse shown for nonperformance; and it is not sufficient to show an award which

the plaintiff repudiates, and is not willing to be bound by." The same question was decided in Levine v. Ins. Co., supra, in which it was said (page 149 of 66 Minn., page 860 of 68 N. W.): "The law also, undoubtedly, is that under such a provision, if an award be set aside for misconduct of the arbitrators not participated in or caused by the insurer, the agreement for an appraisement still remains in force, and a new appraisement, unless it had become impossible, would still be a condition precedent to a right of action on the policy, unless waived." In Westenhaver v. Ins. Co. (Iowa) 84 N. W. 717, the court said (page 720): "Ascertainment of the amount of loss by appraisement was a condition precedent to a right of action, and, if the appraisers selected failed to agree on a third, this does not in itself justify a suit for the amount of the loss. In the absence of bad faith or acts intended to defeat arbitration on the part of the insurer, the plaintiff must propose the selection of other arbitrators, to the end that an award may be agreed upon and the basis for action determined." To the same effect are Carroll v. Ins. Co., 72 Cal. 297, 13 Pac. 863; Hood v. Hartshorn, supra; Thorndike v. Wells Memorial Ass'n, 146 Mass. 619, 16 N. E. 747; and Davenport v. Ins. Co., 10 Daly (N. Y.) 535.

The cases relied on by the plaintiff do not support his contention. Those which are in point clearly recognize the distinction between a collateral and independent provision for arbitration and one which makes an award a condition precedent to the right of maintaining an action upon the contract. In Pepin v. Societe St. Jean Baptiste, 23 R. I. 84, 49 Atl. 387, 91 Am. St. Rep. 620, the by-law under consideration required every contestation between the society and a member to be referred to a committee whose decision should be final. Such a contract is clearly invalid as ousting the courts of their jurisdiction, and was so held. In Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 55, the court clearly recognized the distinction made by the authorities, saying (page 70): "While parties may impose as a condition precedent to application to the courts that they shall first have settled the amount to be recovered by an agreed

mode, they cannot entirely close the access to the courts of law." Chippewa Lumber Co. v. Phenix Ins. Co. is clearly in point, and supports our conclusion. We have cited it, supra. In passing upon an arbitration provision, substantially like the one in the case at bar, the court says (page 121 of 80 Mich., page 1056 of 44 N. W.): "Plaintiff and defendant deliberately agreed to this method of ascertaining the damages. * * * They deliberately provided a penalty for failure to comply with this obligation. If plaintiff refused compliance, then it could not bring suit. If defendant refused compliance, then suit could be brought against it immediately. We hold the agreement reasonable and legal. It is sustained by the clear weight of authority." In Liverpool, etc., Ins. Co. v. Creighton, 51 Ga. 95, the court, speaking of such a stipulation, says (page 110) it does not bar the insured of his right of action without such reference, "unless the stipulation amounts to a condition precedent to his right to resort to the courts, or makes such submission the only mode by which the amount of damage is to be ascertained, or by which the liability of the company can be fixed. Either of these two latter provisions would, at last, be equivalent to making the submission a condition to be performed before suit." In Reed v. Washington Ins. Co., supra, the court say of the provision in the policy before it (page 576, 577 of 138 Mass.): "And it is simply an agreement to refer that matter to arbitration, without any agreement by the plaintiff not to sue. There is nothing to bring it within any of the cases in which a provision to refer has been held to be a condition, such as Scott v. Avery * * * in England, and Hood v. Hartshorn, ubi supra, in this commonwealth." In Mutual Fire Ins. Co. v. Alvord, 61 Fed. 752, 9 C. C. A. 623, the court says (61 Fed. 755, 6 C. C. A. 626): "It is undoubtedly true that a policy of insurance may contain a valid provision which prohibits the insured from maintaining an action until the amount of loss shall have been first submitted to arbitration, and an award shall have been made. In such a case the determination of the amount by arbitration is recognized as a condition precedent to the right to bring suit. * * * But, in order to make such award a condition precedent to

the right of maintaining suit, it must be so expressed in the policy or necessarily implied from its terms. A mere provision in the policy that the amount to be paid, in case of disagreement, shall be submitted to arbitration, does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until after award. * * * There is nothing in the terms of this policy which expressly or by implication forbids the insured from bringing suit until after the amount of loss has been submitted to arbitration and an award has been made, and therefore we must consider the provisions in the policy relating to this subject as constituting a collateral and independent agreement, and not one which was a condition precedent to the right of maintaining an action."

The plaintiff argues that, in accordance with the general rule, the agreement is revocable at any time before an award is made. That, however, does not help the plaintiff. A revocation of the authority of the arbitrators would only stop the proceedings under that arbitration. The provision of the policy requiring an award as a condition precedent to a right of action would still be in force. The revocation, therefore, would only make it necessary to begin the arbitration anew. An award by arbitration having been made by the policy a condition precedent to the right of action, it was incumbent on the plaintiff to allege and prove such award; or, if the award was invalid, then to allege and prove either that the amount of loss had been determined by other arbitrators selected according to the provisions of the policy, or that for some valid reason such determination had become unnecessary or impossible.

The request that a verdict be directed for the defendant should have been grated. And when the case was given to the jury the instructions requested should have been given.

Defendant's exceptions sustained. Petition for new trial granted. Case remitted to the superior court, with direction to enter judgment for the defendant.

BIRMINGHAM FIRE INS. CO. v. PULVER.

Supreme Court of Illinois. November 15, 1888. 126 Ill. 329.

Abandonment of Right to Arbitrate.

Bailey, J. This was a suit in assumpsit, brought by Emilie Pulver against the Birmingham Fire Insurance Company of Pittsburg to recover the amount of a loss under a policy of insurance against fire. The trial in the superior court resulted in a judgment in favor of the plaintiff for $1,103.85, and costs, which judgment was affirmed, on appeal, by the appellate court. By a further appeal, the defendant brings the record to this court and assigns for error the judgment of the appellate court. The policy of insurance in question was one of three policies for $1,000 each, issued to the plaintiff by the defendant and two other insurance companies, upon her stock in trade, consisting chiefly of dresses and cloaks, manufactured and in process of manufacture, and in dress goods and trimmings, contained in a certain building on North Clark street, Chicago. Various questions of fact were presented at the trial, upon most of which the evidence was more or less conflicting. Most prominent among these were whether the plaintiff was the owner of the property insured at the time the policy was issued, and at the time of the loss; whether the plaintiff fraudulently overstated the amount and value of the property destroyed or damaged in her proofs of loss; whether she fully performed the conditions of the policy relating to preliminary proofs of loss, or whether the defendant accepted the proofs rendered as a performance of said conditions, and waived further performance; and the true amount and value of the property damaged or destroyed. As to all these questions the judgment of the appellate court in favor of the plaintiff is conclusive.

Complaint is made of the admission by the superior court of certain evidence offered by the plaintiff upon the question of a waiver by the defendant of the conditions of the policy in relation to preliminary proofs of loss. The policy contained the condition usually found in fire policies on that subject,

and the first count of the declaration alleged the furnishing of certain proofs of loss, and an acceptance and approval of such proofs by the defendant, and a waiver of all exceptions and objections thereto; while the second count alleged that the defendant waived and dispensed with the proofs of loss required by the policy. Certain proofs of loss furnished by the plaintiff to the defendant having been read in evidence, and it appearing that the defendant after having retained said proofs for a considerable time, took some exceptions thereto, the plaintiff, to establish a waiver of the alleged defects in the proofs, gave evidence, among other things, tending to show that shortly after said proofs were served, the attorney who drew them up had died, and that the plaintiff thereupon employed another attorney, who called upon the local agent of the defendant twice to ascertain what was the difficulty with the proofs, and to learn what should be done by way of correcting them; that the local agent offered to show him the proofs, but failed to do so; that he then called upon the defendant's adjusting agent, who also refused to let him see the proofs. The plaintiff then offered, and the court admitted in evidence over the objection and exception of the defendant, a letter written by the attorney to the local agent after the failure of his several efforts to obtain a view of the proofs, in which he recounted his several efforts in that behalf, and their result, and asked for an explanation. We can perceive no error in the admission of this letter. That, and the attorney's preceding interviews with the defendant's agents, were only parts of the attempt on his part to ascertain the nature of the objections to the proofs of loss, so as to be able to obviate them. If there were any defects in the proofs, of which the defendant in good faith complained, it was its duty to point them out, and afford all reasonable facilities to the plaintiff to ascertain what they were, so as to be able to remedy them. A refusal to exhibit the proofs was evidence tending to prove that the objections urged were merely captions, and not made with any view of obtaining corrected proofs. The unwillingness of the defendant to afford reasonable facilities to the plaintiff to prepare and serve amended proofs was evidence for the jury to consider

as tending to show that it was content with the proofs already furnished, and therefore waived all defects therein. It follows that the interviews and correspondence between the plaintiff's attorney and the defendant's agents, in relation to obtaining a view of the proofs served, was competent, as tending to prove such waiver.

The plaintiff, in her proofs of loss, stated the amount of her loss to be $3,886.95, while the notary public, whose certificate is appended to and forms a part of said proofs, stated the loss to be $1,000. The defendant claims, as a matter of law, that the plaintiff is bound by the notary's certificate as to the amount of the loss, and that, as there are three concurrent policies of $1,000 each, the plaintiff's recovery should have been limited to one-third of the amount certified to by the notary. In this view we are unable to concur. Proofs of loss are required by the conditions of policies of insurance for the purpose of furnishing the insurer with evidence upon which to determine the fact and the amount of its liability, and also to serve as a basis for the adjustment of the loss with the insured. Among the proofs required are the plaintiff's sworn estimate of the amount of the loss, and an official estimate of it by a neighboring and disinterested magistrate. The magistrate's certificate is produced, not as the award of an arbitrator, or as the certificate of a party by whose estimate the insured either expressly or impliedly agrees to be bound, but merely as the estimate of a party which the insurer sees fit to require by the conditions of the policy. The insured obtains and furnishes the certificate as a performance of such condition, and not as admitting its accuracy, or agreeing to be bound by it. It is open to him, notwithstanding the certificate, in a suit upon the policy, to establish by witnesses the true amount of the loss. It has been frequently held that even the sworn statement of the insured himself, in his proofs of loss, will not estop him; but that, in a suit upon the policy, he may give evidence of the actual amount of his loss, and recover accordingly. Insurance Co. v. Kepler, 106 Pa. St. 28; Miaghan v. Insurance Co., 24 Hun, 58; Hoffman v. Insurance Co., 1 Rob. (N. Y.) 501, 32 N. Y. 405; Parmelee v. Insurance Co.,

54 N. Y. 193; McMaster v. Insurance Co., 55 N. Y. 222; Insurance Co. v. Huckberger, 52 Ill. 464. In Farrell v. Insurance Co., 7 Baxt. 542, it was held that the statement in the magistrate's certificate as to the value of the property lost by fire is not even competent evidence in favor of the insured, to show the amount of the loss, which could certainly not be the rule if such certificate constituted estoppel, for the reason that estoppels must be mutual.

A number of exceptions were taken by the defendant to the rulings of the court in giving and refusing instructions to the jury. The defendant asked 19 instructions, all of which, as well as the instructions asked by the plaintiff, were refused; the court giving, in lieu of the instructions asked, a series of instructions prepared by himself, covering, as he seemed to view the case, all the questions of law presented upon which it was necessary or advisable to instruct the jury. The property of the practice thus adopted is challenged, the proposition contended for seeming to be that, in this state, the functions of the court in the matter of instructing the jury are practically limited to giving or refusing the written instructions submitted by counsel. Such clearly is not the case. True, he may, if he sees fit, limit himself to giving the instructions submitted by counsel which properly state the law; and then, even though the law be inadequately given to the jury, no error can ordinarily be predicted upon such action, because, if counsel had deemed further instructions necessary, they might and should have asked them. But, where the judge sees proper to do so, it is competent for him to prepare his own charge to the jury; but, if he does so, he should embody in it, either literally or in substance, all proper instructions asked by counsel. Indeed, the preparation of a charge by the judge may often have the advantage of furnishing the jury with a terse, consecutive, and logical statement of the law applicable to the case; in place of the loose, disjointed, and obscure presentation of the law which often results from giving instructions in the form in which they are prepared by the respective counsel. The series of instructions given by the court is criticised, both for what it contains, and for what it omits. So far as it goes,

we are able to discover no error of which the defendant can complain. It is urged that it is erroneous in directing the jury to estimate the plaintiff's damages, in case of a recovery, according to the "fair cash value" of the property destroyed; while the policy requires that the estimate should be made according to "the actual cash value" of the property. Between these two forms of expression we are unable to perceive any practical difference. The actual cash value of property is the price which it will bring in a fair market, after fair and reasonable efforts have been made to find the purchaser who will give the highest price. The actual cash value, then, is the fair or reasonable cash price for which the property can be sold in the market. We see, therefore, no impropriety in explaining the "actual cash value" as meaning the "fair cash value," or in using the two phrases as practically synonymous.

The instructions given enumerate, among the defenses of which the defendant was seeking to avail itself, the failure of the plaintiff to submit her difference with the defendant, in relation to her loss or damage, to arbitration, in accordance with the conditions of the policy; and on that question the jury were instructed as follows: "As to the question of arbitration, you are instructed that, under the provisions of the policy, if there was a dispute as to the amount of the loss, then either party could demand an arbitration, to determine the amount of such loss, by serving a notice in writing on the opposite party; and before you can find against the plaintiff on this point, you must believe, from the evidence, that there was a dispute between the parties as to the amount of the loss, and that notice in writing was served on her, or on some one authorized to act for her, demanding such arbitration, in accordance with the provisions of the policy, and that she, in person or by her attorney, without sufficient cause, refused to submit to such arbitration." It is insisted that this instruction, though holding the law substantially in accordance with the defendant's theory, is erroneous in not conforming in its hypothesis to the evidence as it was actually given; the evidence being, as is claimed, in accordance with the hypothesis of an instruction asked by the defendant,

which was as follows: "If the jury believe, from the evidence, that the plaintiff requested such award, and the defendant accepted and acted upon such request, and proceeded to appoint an arbitrator; and if the jury further believe, from the evidence, that the plaintiff, without any sufficient reason, abandoned said arbitration, so requested by her, then the plaintiff cannot recover in this case, and your verdict will be for the defendant." It is useless to inquire whether the instruction given is defective as is claimed, for the reason that, under the conditions of the policy, a failure to arbitrate could in no event be a defense. The policy provides that, "in case differences shall arise touching any loss or damage, after proof of these has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy." There is no condition in the policy that the loss should not be payable until such arbitration and award should be had, or in any way making a submission to arbitration a condition precedent to the payment of the loss. The promise to pay, and the provision making such payment conditional upon the production of proofs, etc., are in a preceding part of the policy, and are in no way incorporated with or made dependent upon the condition in relation to arbitration. A condition in a policy providing for an arbitration cannot operate to deprive the insured of his right of action, unless clearly made a condition precedent to the existence of such right. Insurance Co. v. Creighton, 51 Ga. 95; Patterson v. Insurance Co., 64 Me. 500; Roper v. Lendon, 1 El. & El. 825; Gere v. Insurance Co., 67 Iowa, 272, 23 N. W. Rep. 137, 25 N. W. Rep. 159; Reed v. Insurance Co., 138 Mass. 572; Canfield v. Insurance Co., 55 Wis. 419, 13 N. W. Rep. 252; Insurance Co. v. Steiger, 109 Ill. 254. There was no error, therefore, in refusing the instructions asked by the defendant on the subject of arbitration; and the instruction given being more favorable to the defendant than it had a right to ask, there was no error in giving it of which the defendant can complain. But it is claimed that the court erred in refusing the defend-

ant's instructions, because they contain various propositions of law, upon which the jury should have been instructed, which are not covered by the instructions given. It would serve no useful purpose for us to review each of the refused instructions in detail, and it must therefore suffice for us to say generally that we have carefully examined them in connection with the instructions given, and are of the opinion that no proposition of law was omitted in respect to which the defendant has any substantial ground of complaint. Several of the instructions refused were properly refused, on account of inherent defects in the instructions themselves. As to the residue, while some collateral points and details are not covered, we think every material point having a direct bearing upon the issues in the case is fairly and clearly stated. Several propositions, it is true, are omitted, which bear merely upon collateral matters, and consist of lectures to the jury upon the proper method of discharging their duties, or cautions against prejudice and favoritism. Instructions of this character may properly be given; but giving them is necessarily a matter very much within the discretion of the court. He is in a position to observe and know whether the situation is such as to render such cautionary instructions necessary to a due administration of justice; and if, in his opinion, they are not, his refusal to give them cannot ordinarily be assigned for error.

At the trial, the defendant called several witnesses who saw the debris and ashes after the fire, and offered to introduce in evidence the estimates or opinions of said witnesses, based upon what they saw, as to the quantity of goods lost by the plaintiff. This evidence was excluded, and, we think, properly. Apart from the consideration that the opinions sought to be elicited were based upon data too uncertain and equivocal to be of any value, the case is not one which properly admitted of expert evidence. It was for the witnesses to describe what they saw; and, if any reliable conclusions could be drawn from the appearence of the debris and ashes as they appeared some time after the fire, the jury were as well qualified as the witnesses to draw such conclusions.

Certain criticisms are made upon the conduct of the judge during the course of the trial. On that subject, we adopt, as

expressing our views, the following portions of the opinion of the appellate court, pronounced by Moran, J.: "Complaint is made of the course of the trial judge, in interfering with the cross-examination of some of the witnesses, and because of remarks made in ruling on points in reply to the arguments of counsel. The cross-examinations were in some instances inordinately extended; and it is in the discretion of the court to confine counsel within reasonable limits. We find no abuse of such discretion in this case. While patience and gravity of bearing is an essential part of justice, the judge has the direction of the trial, and is much better able to perceive what is unnecesssary than counsel, who is engaged in a heated contest with the witness. The remarks or comments of the court mainly complained of were made in ruling upon objections, and are statements that the evidence upon certain points was thus and so. The admissibility of evidence offered frequently depends upon the evidence already introduced; and it is not unusual for the court, in ruling, to allude to such evidence as is in the record, to make his meaning plain. This, of course, should be done in such manner as to express no opinion as to what such evidence proves. Owing to the regard which is paid by jurors to the opinion of the judge, he should use great caution in expressing his opinion on any question which it is the province of the jury to determine. But every unguarded expression of the judge, in stating reasons to counsel for his rulings, cannot be treated as a ground for granting a new trial. To do so would be to greatly embarrass the administration of justice. The jury were told that they were the judges of the weight of the evidence, and of the credibility of the witnesses, and were given the usual instructions as to the preponderance of the evidence, and from the whole course of the trial no doubt thoroughly understood that it was their province to determine what were the facts established by the evidence. We are of the opinion that the inadvertent remarks of the court did not in fact operate to the injury of appellant, and do not constitute such error as to require us for that reason to reverse the case." After a patient examination of the whole record, we fail to find any error of law which, in our judgment, is material. The judgment of the appellate court will therefore be affirmed.

CHAPTER XII.

WAIVER AND ESTOPPEL

INSURANCE COMPANY v. EGGLESTON.

Supreme Court of the United States, 1877. 96 U. S. 572.

Waiver and Estoppel; Course of Business.

Action on a policy of life insurance. Defense, forfeiture for failure to pay the last premium.

The insured, residing in Mississippi, received his policy from a local agent in that state, prior to the due date of the last premium, had always received notice from the defendant stating where the premium should be paid. One or another of the local agencies within the State had so been named. No notice was given respecting the last premium. The home office of the insurance company was in New York City.

Mr. Justice Bradley: We have recently in the case of Insurance Company v. Norton, 96 U. S. 234, shown that forfeitures are not favored in the law; and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is thereby estopped from enforcing the forfeiture. The representations, declarations or acts of an agent, contrary to the terms of the policy, of course will not

be sufficient, unless sanctioned by the company itself, Insurance Company v. Mowry, 96 U. S. 544. But where the latter has, by its course of action, ratified such declarations, representations, or acts, the case is very different.

In the present case, it appeared that the company had discontinued its agency at the place of residence of the insured soon after the policy was issued; and had given him notice by mail from time to time, as the premium installments became due, where and to whom to pay them—sometimes at Savannah, several hundred miles, and sometimes at Vicksburg, a hundred and fifty miles from his residence. Such notice, it would seem, had never been omitted prior to the maturity of the last installment. The effect of the judge's charge was, that if this was the fact, and if no such notice had been given on that occasion, and the failure to pay the premium was solely due to the want of such notice, it being ready, and being tendered as soon as notice was given, no forfeiture was incurred. We think the charge was correct under the circumstances of this case. The insured had good reason to expect and to rely on receiving notice to whom and where he should pay that installment. It had always been given before; the office of the company was a thousand miles away; and they had always directed him to pay to an agent, but to different agents at different times.

Although, as we held in the case of Insurance Company v. Davis, 95 U. S. 425, the legal effect of a policy, when nothing appears to the contrary, may be that the premium is payable at the domicile of the company; yet it cannot be expected or understood by the parties that the policy is, in ordinary circumstances, to be forfeited for a failure to tender the premium at such domicile, when the insured resides in a distant State, and has been in the habit, under the company's own direction, to pay an agent there, and has received no notice that the contrary will be required of him. He would have a just right to say that he had been misled.

Let us look at the matter as it stands. The business of life insurance is in the hands of a few large companies, who are generally located in our large commercial cities. Take a company located, like the plaintiff in error, in New York, for

example. It solicits business in every state of the Union where it is represented by its agents, who issue policies and receive premiums. Could such a company get one risk where it now gets ten, if it was expected or understood that it was not to have local agents accessible to the parties insured, to whom premiums could be paid, instead of having to pay them at the home office in New York? The universal practice is otherwise. Local agents are employed. The business could not be conducted on its present basis without them. Now, suppose the local agent is removed, or ceases to act, without the knowledge of the policy holders, and their premiums become due, and they go to the local office to pay them, and find no agent to receive them; are these policies to be forfeited? Would the plaintiffs in error or any other company of good standing have the courage to say so? We think not. And why not? Simply because the policy holders would have the right to rely on the general understanding produced by the previous course of business pursued by the company itself, that payment could be made to a local agent and that the company would have such an agent at hand, or reasonably accessible. We do not say that this course of business would alter the written contract, or would amount to a new contract relieving the parties from their obligation to pay the premium to the company, if they can find no agent to pay to. That obligation remains. But we are dealing with the question of forfeiture for not paying at the very day; and, in reference to that question, it is a good argument in the mouths of the insured to say: "Your course of business led us to believe that we might pay our premiums at home, and estops you from exacting the penalty of forfeiture without giving us reasonable notice to pay elsewhere." The course of business would not prevent the company if it saw fit, from discontinuing all its agencies, and requiring the payment of premiums at its counter in New York. But, without giving reasonable notice of such a change, it could not insist upon a forfeiture of the policies for want of prompt payment caused by their failure to give such notice. In the case of Insurance Co. v. Davis cited above, the agent's powers were discontinued by the occurrence of the war, of which all persons had notice; and the law of nonintercourse

between belligerents prevented any payment at all; and the policy became forfeited and ended without any fault attributable to either of the parties. That case, therefore, was entirely different from the present; and it was in consequence of such forfeiture in the absence of fault that we held, in the case of New York Life Insurance Co. v. Statham et al., 93 U. S. 24, that the insured was entitled to recover the equitable value of his policy.

In the present case it seems to us that the charge of the judge was in substantial conformity to the principles we have laid down. The insured, residing in the State of Mississippi, had always dealt with agents of the company, located either in his own State, or within some accessible distance. He had originally taken his policy from, and had paid his first premium to, such an agent; and the company had always, until the last premium became due, given him notice what agent to pay to. This was necessary, because there was no permanent agent in his vicinity. The judge rightly held, that, under the circumstances, he had reasonable cause to rely on having such notice. The company did not itself expect him to pay at the home office; it had sent a receipt to an agent located within thirty miles of his residence; but he had no knowledge of this fact—at least, such was the finding of the jury from the evidence.

We think there was no error in the charge, and the judgment of the Circuit Court must be affirmed.

CONTINENTAL LIFE INS. CO. OF HARTFORD, CONN. v. CHAMBERLAIN.

Supreme Court of the United States, Nov. 25, 1889. 132 U. S. 304.

Application—Representations of Agent—Estoppel.

In error to the circuit court of the United States for the northern district of Iowa.

This action is upon a policy of insurance on the life of Richard Stevens, the intestate of the defendant in error. There was a verdict and judgment against the insurance company.

The policy recites that "it is issued and accepted upon the condition that the provisions and requirements printed or written by the company upon the back of this policy are accepted by the assured as part of this contract as fully as if they were recited at length over the signatures hereto affixed." The signatures here referred to are those of the president and secretary of the company.

The application for insurance was taken in Iowa by one Boak, a district agent of the company in certain named counties of the state, 14 in number, having written authority "to prosecute the business of soliciting and procuring applications for life insurance policies within and throughout said territory."

Among the numerous questions propounded in the application was the following: "Has the said party [the applicant] any other insurance on his life? If so, where and for what amounts?" The answer as it appears in the application is: "No other." That answer, as were all the answers to questions propounded to applicant, was written by the company's agent, Boak. In reference to the above question and answer, the latter testified: "I asked him [Stevens] the question if he had any other insurance, as printed in the application and as we ask every applicant, and he told me he had certain certificates of membership with certain co-operative societies, and he enumerated different ones, and said he did not know whether I would consider that insurance or not. I told him emphatically that I did not consider them insurance, and we had considerable conversation about it. He wanted to know my authority for saying I did not consider them insurance. I gave him my authority,—gave him my reasons,—and he agreed with me that these co-operative societies were in no sense insurance companies, and in that light I answered the question 'No.' Question. Did you tell him at the time that the proper answer was 'No,' after he had stated the facts? Answer. I did. Q. Who wrote the answer in there? A. I did."

The application also contained these clauses: "And it is hereby convenanted and agreed that the statements and repre-

sentations contained in this application and declaration shall be the basis of and form part of the contract or policy of insurance between the said party or parties signing this application and the said Continental Life Insurance Company, which statements and representations are hereby warranted to be true, and any policy which may be issued upon this application by the Continental Life Insurance Company, and accepted by the applicant, shall be so issued and accepted upon the express condition that if any of the statements or representations in this application are in any respect untrue, or if any violation of any covenant, condition, or restriction of the said policy shall occur on the part of the party or parties signing this application, then the said policy shall be null and void, and all moneys which may have been paid on account of said policy shall be forfeited to the said company.

"And it is hereby further covenanted and agreed that the officers of the said company, at the home office of the said company, in Hartford, Conn., alone shall have authority to determine, whether or not the policy of insurance shall be issued on this or any application, or whether or not any insurance shall take effect under this or any application.

"And it is hereby further covenanted and agreed that no statements or representations made or given to the person soliciting this application for a policy of insurance or to any other person shall be binding on the said company, unless such statements or representations be in writing in this application when the said application is received by the officers of the said company at the home office of the said company, in Hartford, Conn."

Among the "Provisions and Requirements" printed on the back of the policy are the following:

"(11) The contract between the parties hereto is completely set forth in this policy, and the application therefor, taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing, signed by the president or secretary of the company, whose authority for this purpose will not be delegated.

"(12) If any statement made in the application for this policy be in any respect untrue, this policy shall be void, and all

payments which shall have been made to the company on account of this contract shall belong to and be retained by the company: provided, however, that discovery of the same must be made by the company, and notice thereof given to the assured, within three years from the date hereof."

It was admitted on the trial that at the date of Stevens' application he had insurance in co-operative companies to the amount of $12,000.

The company contended in the court below that by the terms of the policy it was discharged from liability by reason of the answer, "No other," to the question as to other insurance on the life of the applicant; its contention being that the certificates of membership in co-operative societies constituted insurance, which should have been disclosed in the written answer to that question.

The court below charged the jury, in substance, that if, at the time the application was being prepared, Stevens fully stated the facts to the agent Boak, and the latter came to the conclusion that certificates in co-operative companies did not mean insurance within the view the defendant took of insurance, and in that view wrote the answer that there was no other insurance, then it was the company, by its agent, that made the mistake, and for such mistake the responsibility cannot be placed upon the assured. Again: "If, therefore, you find under the evidence that Stevens did state fully and fairly the facts in regard to those different insurances in co-operative companies to the agent, and the agent, knowing all these facts, wrote the answer in the application as it is contained therein, the defendant is now estopped from making defense by reason of the fact that Stevens did have insurance in these co-operative companies."

Mr. Justice Harlan, after stating the facts in the foregoing language, delivered the opinion of the court.

It must be assumed upon the record before us that Boak had authority from the defendant to prosecute the business of soliciting and prosecuting applications for policies; that Stevens acted in good faith, and made to the company's agent a full disclosure of every fact involved in the question as to whether he had other insurance upon his life; that he was

informed by the agent that insurance in co-operative societies was not deemed such insurance as the company required to be stated, and that Boak, upon his own responsibility, as agent of the defendant, though with the knowledge and assent of Stevens, wrote the answer, "No other," assuring the applicant at the time that such was the proper answer to be made.

Is the insurance company estopped, under these circumstances, to dispute its liability upon the policy? This question, the plaintiff insists, must receive an affirmative answer upon the authority of Insurance Co. v. Wilkinson, 13 Wall. 222; Insurance Co. v. Mahone, 21 Wall. 152; and Insurance Co. v. Baker, 94 U. S. 610; while the defendant contends that the case of Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. Rep. 837, requires it to be answered in the negative. An extended statement of those cases is not necessary, and therefore will not serve any useful purpose; for the present case can be determined upon its special facts, and upon grounds that did not exist in any of the others.

By the first section of an act of the legislature of Iowa approved March 31, 1880, entitled "An act relating to insurance and fire insurance companies" (Laws Iowa 1880, c. 211, p. 209), it is provided that "any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding."

The second section, among other things, requires all insurance companies or associations, upon the issue or renewal of any policy, to attach to the policy, or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of the policy, are made a part thereof, or of the contract of insurance, or are referred to therein, or which may in any manner affect the validity of the policy. The third section relates only to policies of fire insurance. The last clause in the act is in these words: "All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

In Cook v. Association, 74 Iowa, 746, 748, 35 N. W. Rep. 500, where the question arose as to the scope of the above statute, the supreme court of Iowa said: "Considering the title of the act, and all of its provisions, it seems to us to be very clear that it applies in its first and second sections to all kinds of insurance. There can be no doubt that section one applies to any and all classes of insurance, whether life, fire, marine, insurance of live-stock, or any other kind of insurance; and the same may be said of the second section. To hold otherwise would, it seems to us, be inconsistent and repugnant to the title of the act. If all insurance was not contemplated, the title would have been, simply, 'An act relating to fire insurance companies.' " The object of this legislation is manifest. But if any doubt on the subject existed, it is removed by the case of Insurance Co. v. Shaver, 76 Iowa, 282, 286, 41 N. W. Rep. 19, in which it was said: "The purpose of the statute was to settle, as between the parties to the contract of insurance, the relation of the agents through whom the negotiations were conducted. Many insurance companies provided in their applications and policies that the agent by whom the application was procured should be regarded as the agent of the insured. Under that provision they were able to avail themselves, in many cases of loss, of defenses which would not have been available if the solicitor had been regarded as their agent, and many cases of apparent hardship and injustice arose under its enforcement, and that is the evil which was intended to be remedied by the statute, and it ought to be so interpreted as to accomplish that result."

This statute was in force at the time the application for the policy in suit was taken, and therefore governs the present case. It dispenses with any inquiry as to whether the application or the policy, either expressly or by necessary implication, made Boak the agent of the assured in taking such application. By force of the statute, he was the agent of the company in soliciting and procuring the application. He could not, by any act of his, shake off the character of agent for the company. Nor could the company by any provision in the application or policy convert him into an agent of the assured. If it could, then the object of the statute would be

defeated. In his capacity as agent of the insurance company, he filled up the application,—something that he was not bound to do, but which service, if he chose to render it, was within the scope of his authority as agent. If it be said that, by reason of his signing the application, after it had been prepared, Stevens is to be held as having stipulated that the company should not be bound by his verbal statements and representations to its agent, he did not agree that the writing of the answers to questions contained in the application should be deemed wholly his act, and not, in any sense, the act of the company, by its authorized agent. His act in writing the answer, which is alleged to be untrue, was, under the circumstances, the act of the company. If he had applied in person, at the home office, for insurance, stating in response to the question as to other insurance the same facts communicated by him to Boak, and the company, by its principal officer, having authority in the premises, had then written the answer, "No other," telling the applicant that such was the proper answer to be made, it could not be doubted that the company would be estopped to say that insurance in co-operative societies was insurance of the kind to which the question referred, and about which it desired information before consummating the contract. The same result must follow where negotiations for insurance are had, under like circumstances, between the assured and one who in fact, and by force of the law of the state where such negotiations take place, is the agent of the company, and not, in any sense, an agent of the applicant.

It is true that among the "Provisions and Requirements," printed on the back of the policy, is one to the effect that the contract between the parties is completely set forth in the policy and in the application, and "none of its terms can be modified nor any forfeiture under it waived except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated." But this condition permits—indeed, requires—the court to determine the meaning of the terms embodied in the contract between the parties. The purport of the word "insurance" in the question, "Has the said party any other insurance on his life?" is not so absolutely certain as, in an action

upon the policy, to preclude proof as to what kind of life insurance the contracting parties had in mind when that question was answered. Such proof does not necessarily contradict the written contract. Consequently, the above clause, printed on the back of the policy, is to be interpreted in the light of the statute, and of the understanding reached between the assured and the company by its agent when the application was completed, namely, that the particular kind of insurance inquired about did not include insurance in co-operative societies. In view of the statute, and of that understanding, upon the faith of which the assured made his application, paid the first premium, and accepted the policy, the company is estopped, by every principle of justice, from saying that its question embraced insurance in co-operative associations. The answer of "No other," having been written by its own agent, invested with authority to solicit and procure applications, to deliver policies, and, under certain limitations, to receive premiums, should be held as properly interpreting both the question and the answer as to other insurance. The judgment is affirmed.

BAKHAUS v. CALEDONIAN INS. CO.

Court of Appeals of Maryland. 1910. 112 Md. 676.

Conditions as to Ownership, Waiver.

Thomas, J. In 1901, John Bakhaus, the appellant, and his wife, who for 15 years and practically ever since they came to America, had been engaged in keeping a stall in Cross Street Market, in Baltimore City, where they sold smoked fish, eels, and "German produce," purchased for $575 an unimproved lot in Brooklyn, Anne Arundel county, near Baltimore, containing about three acres of land, on which, a year later, they gave a mortgage for $350. In 1904 they erected on a portion of this lot, on the corner of Sixth street and Stools road, a dwelling house, said to be worth $1,500 or $1,600, in which

they resided with their children at the time of the fire hereinafter referred to. In April, 1907, they began the erection of six other dwelling houses on said lot, the nearest of them being about 30 feet from their dwelling. They were not built by contract, but the appellant and his wife purchased the materials and employed the carpenters and other mechanics; the appellant and his son, who was 17 years of age, assisting in the work. The condition of these houses, which were unoccupied, and with their dwelling were destroyed by fire on January 19, 1908, is described in the record as follows: "The six houses were all under roof, three were plastered and painted and ready for occupancy, except that the porches were not built and yards were not fenced; lumber for porches and fences was there; and three were lathed, but not plastered or painted on the inside; all six were painted on the outside; the doors were all on or fitted and standing in the houses and were burnt; the shutters were in the dwelling and were saved; the houses were two stories and basement containing four rooms, basement kitchen and cellar, or counting the cellar, six rooms in all; these houses were all frame; the nearest of them was about 30 feet from his dwelling; none of the porches had been put up and the lumber which was intended for the porches was piled between the six houses and the dwelling and was removed by them at the time of the fire and not burnt."

At the time of the fire there were two policies of fire insurance on the dwelling in which the appellant and his family resided, one issued by the German Insurance Company to the appellant and his wife, for $500 on the dwelling and $350 on their furniture, and the other by the Caledonian Insurance Company, May 3, 1905, for three years, in favor of the appellant for $500; and there were also two policies on the six dwelling houses, one for $3,000 to the appellant and his wife, issued by the Germania Fire Insurance Company, and the other issued by the Caledonian Insurance Company, November 27, 1907, in favor of the appellant, for $1,200, or $200 on each house. The German Insurance Company settled with the appellant and his wife the loss occasioned by said fire, but the Caledonian Insurance Company, through Thomas E. Bond, its adjuster, notified the appellant by letter, dated April 6,

1908, that it denied liability under its said policies, and on the 9th of May the appellant brought two suits againt the appellee, one on the $500 policy and the other on the $1,200 policy.

These policies contain the usual clauses found in the New York standard fire insurance policies, requiring the insured to give written notice of a loss; to furnish, within 60 days after the fire, unless the time is extended in writing by the company, proofs of loss, and providing that the amount of loss, as ascertained in accordance with the terms of the policy, shall be payable 60 days after satisfactory proofs of loss, etc., have been received by the company. They also contain the following conditions: "This entire policy shall be void if the insured has concealed or misrepresented, in writing, or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; * * * or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

There was also added to the policies the following warranty: "Warranted by the assured that this dwelling shall be occupied by a family during the life of this policy, which shall not be construed as meaning the occupancy of an apartment or apartments by a man or men, and which, however, shall not prejudice assured's right to the ten (10) days' vacancy permitted by the conditions of this policy."

In the first case the defendant pleaded "never promised as alleged," and that it "never was indebted as alleged," and,

relying upon the above provisions of the policy, set up the further defenses: First, that the plaintiff did not furnish the proofs of loss as required by the policy; second, that the interest of the insured in the property was not truly stated in the policy, the policy having been made to the plaintiff alone, whereas the property belonged to the plaintiff and his wife as tenants by the entireties; third, that the plaintiff was not the unconditional and sole owner of the property, as required by the policy, and that said provision of the policy had not been modified by any agreement added to or indorsed thereon; and fourth, that at the time of the execution of the policy, and at the time of the fire, there was a mortgage on the property for $350, which fact was concealed by the plaintiff and was not stated in the policy, and that therefore the interest of the insured in the property was not truly stated in the policy. In the second case, in addition to the pleas relied on in the first case, the defendant further alleged: First, that the buildings remained vacant and unoccupied for more than 10 days, and had never been occupied by families as required by the policy; second, that the plaintiff, at the time of the execution of said policy, represented that the houses were occupied by tenants, whereas said houses were not so occupied; and third, that at the time of the execution of said policy the plaintiff represented to the defendant that there was $300 insurance on each of the houses, whereas there was $500 insurance on each of the houses, and that said representations were as to material facts, were relied on by the defendant, and were fraudulently made.

Issues were joined on the first and second pleas, and to the other pleas the plaintiff replied: First, that the defendant waived the furnishing of proofs of loss; second, that there were attached to said policies riders containing the following provision: "Loss if any payable to the assured as interest may appear," and that he did not conceal the existence of said mortgage or make any misrepresentation concerning the same; third, that the houses covered by the policy for $1,200 "were in course of construction at the time the policy was issued, that the defendant's agent saw them and knew it, * * * that the fire occurred before they were completed and ready for occupancy, and the policy contained the following indorse-

ment: 'Permission to make alterations, additions, completions, and repairs, and this policy to cover materials on premises for making same' "; fourth, that he did not represent to the defendant at the time of the issuing of the policy that the houses therein mentioned were occupied by tenants, and that the agent of the defendant knew that the houses were not occupied and were not completed or ready for occupancy; and fifth, that he did not represent to the defendant at the time the policy was issued that there was $300 insurance on each of the houses, and that he told the defendant's agent that there was $500 insurance on each house.

There are numerous pleas, replications, and rejoinders, occupying a large part of the record, but the above statement of the pleadings is sufficient to indicate the defenses relied on by the defendant, the contentions of the parties, and the more important questions to be determined on this appeal.

The record contains five exceptions: The first is to the order of the court consolidating the two cases; the second, third, and fourth to rulings on the evidence; and the fifth to the granting of the defendant's second prayer. At the conclusion of the testimony produced by the plaintiff the defendant offered the following prayers:

1. At the request of the defendant, the court instructs the jury that under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover, and the verdict must therefore be for the defendant.

2. At the request of the defendant, the court instructs the jury that by the uncontradicted evidence in this case, the plaintiff did not furnish to the defendant the proofs of loss required to be rendered by the plaintiff to the defendant under each policy sued on, and there being no evidence in this case legally suficient to show any waiver by the defendant of this requirement of the policies, the verdict of the jury must be for the defendant.

3. At the request of the defendant, the court instructs the jury that with respect to the $1,200 policy offered in evidence, the same contained a warranty that the insured premises should be occupied by a family during the life of the policy (except that 10 days' vacancy was permitted), and that by the uncon-

tradicted evidence the insured property was not occupied by a family for a period of more than 10 days preceding the fire; and that there is no evidence in this case legally sufficient to show any waiver by the defendant of this warranty, and that therefore there is no evidence in this case legally sufficient to entitle the plaintiff to recover against this defendant on said $1,200 policy.

4. The defendant prays the court to instruct the jury that under the pleadings there is no evidence in this case legally sufficient to show any value of the plaintiff's interest in the property destroyed by fire, and for the damage to which this suit is brought, and that therefore the jury can award the plaintiff only nominal damages.

The court rejected the first, third and fourth prayers, but granted the second prayer, instructing the jury that there was no evidence legally sufficient to show a waiver by the defendant of the provision of the policies requiring the plaintiff to furnish proofs of loss. The verdict and judgment were accordingly in favor of the defendant, and from that judgment this appeal was taken.

The first important question to be considered relates to the granting of that instruction. It is conceded that the plaintiff did not furnish proofs of loss, and that, under the terms of the policies, unless there was evidence of a waiver of the provisions requiring him to do so, there was no error in the court's ruling.

It is said in 13 Am. & Eng. Ency. of Law, 345 (2d Ed.) that "a great variety of acts and circumstances have been held to constitute waiver of the terms and conditions of policies as to proofs of loss, but these may be brought together under three general heads, namely: First, acts, conduct, or statements of the insurer or those representing it by which the insured is induced not to make proofs or to believe that they are not required or will not be insisted on; second, acts or conduct of the insurer or its representatives recognizing its liability and showing an intention not to require proofs or to dispense with them; third, acts or conduct making it apparent that the furnishing of proofs would be an unnecessary formality and nugatory." It is also said that the waiver may

be "by a general agent, and adjuster or special agent of the insurer for adjusting the loss or like losses, or another agent of the insurer acting within the apparent scope of his authority." 13 Am. & Eng. Ency. of Law, 350 (2d Ed.); 19 Cyc. 859, 860. In the case of Rokes v. Amazon Insurance Co., 51 Md. 512, 34 Am. Rep. 323, this court held that proofs of loss are required for the benefit of and may be waived by the insurer, and that it is not "necessary to prove an express agreement to waive," but that "it may be inferred from the acts and conduct of the insurer inconsistent with an intention to insist upon the strict performance of the condition." Judge Page, in Hartford Fire Ins. Co. v. Keating, 86 Md. 149, 38 Atl. 29, 32, 63 Am. St. Rep. 499, referring to the provisions in a policy requiring proofs of loss to be furnished within 60 days, says: "All authorities agree that the condition may be waived, either expressly or by acts and conduct of the insurer himself, or of his agent, having real or apparent authority; and the waiver may be inferred from such acts and conduct as are inconsistent with an intention to insist upon a strict performance." In the case of Continental Ins. Co. v. Reynolds, 107 Md. 96, 68 Atl. 277, Judge Burke, dealing with a provision in the policy making the loss payable 60 days after the furnishing of satisfactory proofs of loss, after stating that the provision was inserted for the benefit of the company, and that it may waive the provision or deny liability under the policy, in either of which events the insured may bring suit without waiting for the expiration of the time limit, says: "But whether there has been a waiver, an estoppel, or a repudiation of liability under the contract, is a question to be ascertained from the conduct of the insurer and from all the facts and circumstances of the case. * * * And where the evidence tends to show that the company had definitely determined not to pay the loss, or had waived the provision under consideration, or was estopped by its conduct to insist upon it, it would be error to declare as a matter of law that the suit was premature." And it had been repeatedly held in this state that provisions in policies limiting and restricting the power of agents to waive the conditions and provisions of the policy have reference to conditions and provi-

sions that enter into and form a part of the contract, and which are essential to make it a binding contract, and do not refer to stipulations to be performed after a loss has occurred. Franklin Fire Ins. Co. v. Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469; Rokes v. Amazon Ins. Co., supra; Farmers' Fire Ins. Co. v. Baker, 94 Md. 545, 51 Atl. 184; 19 Cyc. 360.

It is not necessary to refer to the many cases in this state and elsewhere for illustrations of the application of the doctrine. The rule is well settled, and the question of waiver in any case must depend upon the facts and circumstances of that case. The provisions relating to proofs of loss are, as has been stated, inserted in the policy for the exclusive benefit of the insurer, in order that it may be informed of the nature, character, and extent of the loss, and while the insurer may stand on its contract and exact compliance with its terms, there is no reason why these provisions may not be waived by it. The business in which insurance companies are engaged is one in which the security and protection of the insured are largely intrusted to the honesty and fairness of the insurer, and this court has frequently said that good faith demands of them "frank and open dealing with their policy holders." Any acts or conduct of the insurer, or its representative, that are, under the circumstances, calculated to mislead the insured and to induce him to believe that performance of the condition will not be required, or that proofs of loss would be ineffectual and nugatory, will, if he is thereby misled, amount to a waiver.

Turning to the facts in the case, we find, in addition to what has already been stated, that the fire which caused the loss sought to be recovered in this case was first discovered by the appellant and his wife while on their way home from Cross Street Market, between 12 and 1 o'clock Saturday night, January 18, 1908. The houses and their contents, except the foundations and the furniture, etc., on the first floor of appellant's dwelling, were completely destroyed. The appellant sent his son to notify the insurance companies, and on the second day after the fire Dr. Brooks, the agent of the appellee from whom the policies in this case were obtained, Mr. Bond, the adjuster for the appellee and the Germania

Fire Insurance Company, and Mr. Deming, the adjuster for the German Insurance Company, went to the scene of the fire and asked for the appellant, but he was not at home. They measured the foundations of the houses and questioned the appellant's son. Mr. Bond asked him where he was at the time of the fire, "how near the houses were finished," and if the shutters were on the houses. After talking to some of the people in the neighborhood, they told the appellant's son to tell his father to come to Mr. Deming's office the next day. On his way home from Baltimore the appellant met Mr. Bond, Dr. Brooks, and Mr. Deming returning to Baltimore, and Mr. Bond and Mr. Deming told him to meet them at Mr. Deming's office the next day. He accordingly went to Mr. Deming's office and there met Mr. Deming, Mr. Bond, and Mr. Deming's son.

In reply to the question, "What took place there?" the appellant said: "They asked me how I discovered the fire and I told them all about it; that I came from town with my wife; and they asked me how far the houses were finished and I told them, and how much those houses would cost to finish them, and all those questions that Mr. Bond asked me. He asked me who made the concrete foundations, and I told him I did, with two or three men to help me; and he told me I had made a good job of it. And then Mr. Deming told me that I should make a list of the furniture; Mr. Bond told me as he went out, he said, 'You will hear from me.' " The appellant further testified that neither Mr. Bond nor Mr. Deming said anything to him "about making up written proofs about the houses." When asked, "When was the next time you saw Mr. Bond?" appellant replied: "It was about eight days afterwards. Me and my wife went to the German Fire Insurance Company and from there they told us we should go to Mr. Deming. As we came into Mr. Deming's office Mr. Bond was in there, but Mr. Bond did not give me any chance to talk with him. Once he saw me and my wife and went out of the door." He stated that the next time he saw Mr. Bond was at the fire marshal's office, and when asked how he happened to be in the fire marshal's office, he said: "The deputy fire marshal came up there and he ordered me down to

his office and I made a statement to him, and one day I went to the mail and there was a letter there to John Backhaus from the state fire marshal to come up to his office. As I came up there they found out they had the wrong man; that letter was intended for my son. And as I was sitting there Mr. Deming he came, and Mr. Bond came out and asked me a lot of questions about the fire; asked how far the houses were finished, and the state fire marshal he ordered me out of the door and he says, 'Step out a minute.' Mr. Deming went out before that. Then the fire marshal came and he said, 'You can tell your son to come up to-morrow morning about 11 o'clock,' and I said, 'All right.' But I did not go away, I waited in the corridor and wanted to talk with Mr. Bond. Mr. Bond came out and I asked Mr. Bond, I said, 'What are you going to do about my insurance?' and he told me again, he said, 'I cannot do a thing; you will hear from me; I cannot do a thing.'" Appellant stated further that Mr. Bond asked him in the fire marshal's office if he knew about the shavings and a barrel; "how it was the doors and shutters were in his dwelling;" if he had left the barrel in one of the houses with shavings in it, and if he had refused to let people in the stables to take the horse out, and that after this conversation with Mr. Bond, he waited to hear from him, and "about 14 days after I waited and waited and didn't hear anything from Mr. Bond or from anybody, I went up to the German Fire Insurance Company again, and the German Fire Insurance Company sent me to Mr. Deming, and Mr. Deming, he was not ready for me then; and I went in to Mr. Bond—right in Mr. Bond's office. While I came in there Mr. Bond was sitting at the telephone and I asked him again and he says: 'I have just been telephoning to Mr. Deming, and I am going to see Mr. Deming tomorrow and we will let you know.'"

The appellant did not hear anything further from Mr. Bond until he received the following letters: "Baltimore, April 6, 1908. Mr. John Backhaus, Baltimore, Maryland—Dear Sir: The Caledonian Insurance Company instructs me that it admits no liability under its policy No. 1,776,827, and hereby tenders you the return of the full amount of premium paid thereon, being the sum of twelve $^{00}/_{100}$ dollars, which find

enclosed. Please receipt for same on this letter and return to me. Yours truly, Thomas E. Bond, adjuster Caledonian Insurance Company. Baltimore, April 6, 1908." "Mr. John Backhaus, Baltimore, Maryland—Dear Sir: The Caledonian Insurance Company instructs me that it admits no liability under its policy No. 1,643,483, and hereby tenders you the return of the full amount of premium paid thereon, being the sum of seven $^{5}/_{100}$ dollars, which find enclosed. Please receipt for same on this letter and return to me. Yours truly, Thomas E. Bond, adjuster Caledonian Insurance Company."

Mr. Hutton, the deputy fire marshal, testified that at the request of Mr. Bond he made an investigation of the burning of the appellant's houses; that he talked with a number of people; that he examined the appellant under oath on the 25th January, 1908, and that his questions and the appellant's answers were written down; that "Mr. Bond was thoroughly conversant with everything"; that he, Mr. Bond, read over the statement of the appellant "the same day or the next day after it was taken," and was in the fire marshal's office "almost daily relative to the matter." This statement is set out in the record, and not only contains all the information required to be furnished by proofs of loss, but the questions asked the appellant clearly indicate that he was under the suspicion of having set fire to the property. There is also evidence tending to show that according to a general custom the adjuster furnishes the insured with blank proofs of loss, unless he determines not to pay the loss, in which event all discussion and negotiations with the insured cease. This evidence was stricken out on motion of the defendant; but we think it was admissible, not for the purpose of imposing on the insurer an additional obligation, or because the failure of an adjuster to furnish the blanks in accordance with such a custom as the evidence disclosed would, standing alone, amount to a waiver, but in connection with other evidence in the case, as reflecting upon the question whether the conduct of the insurer, or its agent, under the circumstances, induced the insurer to believe that proofs of loss would not be required.

From this statement of the facts in the case it is apparent

that there was error in the instruction granted. The conduct of the adjuster, under the circumstances of this case, could have led the plaintiff to but one conclusion, namely: That proofs of loss were not required, and that the company would either pay the loss or deny all liability under the policies. He was directed by the adjusters, after they had visited the scene of the fire, to meet them at Mr. Deming's office; he met them there, and after they had discussed the loss, Mr. Deming told him to make out a list of the furniture destroyed, and Mr. Bond told him he would hear from him. He was then required, at the instance of Mr. Bond, to make a statement under oath to the fire marshal. Having thus furnished the defendant's adjuster all the information that was required by the terms of the policies, knowing that he was suspected of having set fire to the property, when Mr. Bond again told him at the fire marshal's office that he would hear from him, he had every reason to believe that nothing more would be required of him, and that he had only to wait until the company concluded to either settle the loss or deny liability. Under such circumstances, it cannot be said that there is no evidence of a waiver by the insurer of a condition in the contract, the only object of which was to enable it to secure information concerning the nature, character, and extent of the loss. Farmers' Fire Ins. Co. v. Baker, 94 Md. 555, 51 Atl. 184.

The rule that an unqualified denial of liability by an insurance company within the 60 days allowed for filing proofs of loss will constitute a waiver is not denied by counsel for the appellee. For the same reason, any other statement or conduct of the insurer within the 60 days that is calculated to mislead the insured and to induce him to believe that proofs of loss will not be required will, if acted on by the insured, have the same effect.

Since the argument of this case, our attention has been called to the decision, February 1, 1910, of the United States Circuit Court of Appeals in the case of John Backhaus and wife v. Germania Fire Insurance Co., 176 Fed. 879. In that case the court was dealing with an entirely different question. There the policy was void at the time of the fire under the pro-

vision prohibiting other insurance, and the court, applying the rule of the federal courts that the doctrine of waiver "can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured, if they were afterwards allowed to disavow their conduct and enforce the conditions," held that the conduct of the adjuster, after the fire and after the forfeiture of the policy, did not amount to a waiver of the condition. In the opinion delivered by Judge Brawley, the court referring to the statement of the adjuster to the insured, "You will hear from me," says: "If this had been said after the discovery of the over insurance and before the fire, it might have been argued with some plausibility by the insured that: If you had notified me of the company's intention to insist upon the forfeiture, it would have been in my power to protect myself by other insurance, and it might be claimed that the insured was misled to his prejudice into believing that the company, with full knowledge of the fact, would not insist upon the forfeiture." In the case at bar, at the time of the alleged waiver, there had been no forfeiture of the policies, and the reasoning of Judge Brawley, as applied to the question with which we are dealing, does not seem to be in conflict with the views we have expressed.

The policies were issued to the appellant alone, and it appears from the evidence in the case that the property belonged to the appellant and his wife as tenants by the entireties, and that at the time the policies were issued there was a mortgage on the property for $350. The appellee contends that the policies were therefore void, under the conditions requiring the insured to be the unconditional and sole owner, and his interest to be truly stated in the policy; while the appellant insists that these provisions were waived or modified by the riders making the loss payable to the assured "as interest may appear."

There can be no doubt as to the meaning or object of these provisions. It is of importance for the insurer to be informed of the nature and extent of the insured's interest, in order that it may judge of the character of the risk. In the case of Bowman v. Franklin Fire Ins. Co., 40 Md. 620, Judge

Alvey says that "the great purpose of all such provisions in policies of insurance is to enable the insurer to determine the extent of the risk, and the nature and extent of the interest of the insured in the premises." In Richards on Insurance, § 237, the author says: "The policy not infrequently insures one or more persons 'as interest may appear.' It is sometimes convenient to use this phrase where the interests are shifting or uncertain; for example, where owner and creditors or lienors desire protection by one policy, of where the owner has died and the vesting of interests may be ill defined, or contingent and for a time, perhaps, unrepresented by an executor or administrator, or where owner and tenant require security under the same insurance, or where vendor and vendee wish to be covered during a pending contract of sale in part performed. In considering the application and effect of the phrase a clear distinction must be observed between the frequent use of the words 'as interest may appear' in connection with the names of the assured, and the frequent use of the same words in connection with any third party named in the policy, as a mere payee or appointee to receive the insurance money. In the latter instance the payee takes only what the assured is entitled to receive, and if the assured has broken a warranty the payee gets nothing."

In the case of Dakin v. Liverpool, London & Globe Insurance Company, 77 N. Y. 600, the policy contained conditions avoiding the policy if the interest of the insured was not truly stated therein, or other than unconditional and sole ownership, and the policy was issued to the insured "as interest may appear," and the court held, quoting from the syllabus, that "where to the name of the insured, in a policy of fire insurance, are added the words, 'as interest may appear,' this indicates uncertainty not only as to the extent, but as to the quality or character of the interest; the use of the phrase authorizes the insured, in case of loss, to show what his interest was; and the policy has the same effect as if the facts as to the interest, as subsequently shown, were inserted in the policy, If, therefore, it thus appears that the insured, although not the owner, had an insurable interest, there is no

breach of a condition of the policy forfeiting it in case the interest of the insured is not truly stated in the policy, or, if the interest is less than absolute ownership, and it is not so represented in the policy." It is said in 19 Cyc. 699: "If a policy is made payable to a designated person 'as his interest may appear,' there is no necessity for a specific statement as to the payee's interest; the policy amounting to a waiver of such a requirement. But this does not excuse a breach of condition as to statements of title on the part of the insured; the payee not being regarded as such, nor the insurer as charged with notice of the nature of the payee's interest." Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457.

It is therefore clear upon authority that where the loss is made payable to a third person "as his interest may appear," the conditions of the policy referred to are not waived, but where the policy is issued to the insured "as his interest may appear," they are waived. Keeping in view the object of these provisions, it would seem equally clear upon reason that where the loss is made payable to the assured "as his interest may appear," that the interest referred to is the interest of the assured in the property, and that the intention of the parties to the contract was to protect that interest, whatever it might be. The assured cannot be treated as an assignee of the policy or appointee to receive the amount of loss. His interest in the amount of loss is derived from his interest in the property, and it would be a contradiction to say to the assured, "Your policy will be void if your interest is 'other than unconditional and sole ownership,' or is not truly stated in the policy; but the loss will be payable to you as your interest may appear." We fully concur in the view of the learned court below that this provision of the rider would be meaningless, unless it amounts to a waiver of the conditions referred to, and that it indicates an uncertainty in the minds of the parties to the contract as to the nature and extent of the insured's interest in the property, and that the agreement was that, in case of loss, the insured should receive the benefits of the policies according to his interest in the property. This construction affords ample protection to the insurer, and gives

effect to a contract that would otherwise have been void at the time it was executed. Hagan v. Scottish Ins. Co., 186 U. S. 423, 22 Sup. Ct. 862, 46 L. Ed. 1229.

The fifth plea in the first case and the sixth plea in the second case (the two cases having been consolidated after the pleas, replications, and rejoinders, etc., were filed) assert the proposition that the policies were void under the provision requiring the interest of the assured to be truly stated in the policy, because it was not stated in the policy that the property belonged to the insured and his wife; while in the eighth plea in the first case and the thirteenth plea in the second case the defendant relies on that provision and also the sole ownership clause, and charges that the policies were void because they were issued to the insured alone, whereas the property was owned by the insured and his wife. By its seventh plea in the first case and its twelth plea in the second case the defendant set up the defense that the policies were void, under the provision requiring the insured's interest to be stated therein, by reason of the undisclosed mortgage, to which the plaintiff replied that the existence of the mortgage "was not a material fact or circumstance to the risk of this insurance." The court below overruled plaintiff's demurrers to the fifth, sixth, eighth, and thirteenth pleas referred to, and sustained the demurrers to the replications to said seventh and twelth pleas, but as we have already decided that these conditions of the policies were waived by the riders, making the loss payable to the "assured as interest may appear," it is not necessary to pass on the questions raised by the demurrers to these pleas and replications.

Nor is it necessary to review the rulings of the court below, sustaining the demurrers to plaintiff's first replications to defendant's third and fourth pleas in each case. In those pleas the defendant relied on the failure of the plaintiff to furnish proofs of loss, and the plaintiff replied that the defendant had waived the provision requiring him to do so. The court below sustained the demurrers on the ground that the replications were prolix and argumentative, and the plaintiff then filed additional or amended replications alleging waiver of proofs of loss, on which issues were joined. Where a de-

murrer to a plea or replication is sustained, and the pleader gets the full benefit of his defense or reply in an additional or amended plea or replication, he is not prejudiced by the ruling on a demurrer, even if the court erred. Moses v. Allen, 91 Md. 42, 46 Atl. 323; Fisher v. Diehl, 94 Md. 112, 50 Atl. 432; Bowman v. Little, 101 Md. 273, 61 Atl. 223, 657, 1084. What we have just said applies also to the rulings on the demurrers to the first replications to the eighth and ninth pleas in the second case. These replications were held bad for duplicity, and the plaintiff then filed additional or amended replications setting up, in different forms, the same matters in reply to the pleas.

We find no error in the rulings in the first, second, and third bills of exception. Section 8 of article 50 of the Code of 1904 provides that "where two or more actions or obligations conditioned for the payment of any money or two or more actions on the case arising ex contractu by and between the same plaintiff and the same defendant shall be brought at the same term, the court in which such actions are pending shall, on motion of the defendant, order the said actions to be consolidated and when consolidated shall direct the clerk to tax the cost of but one action."

The plaintiff was asked by his counsel if he had ever read his policies, and the question being objected to, the witness was then asked: "Prior to the receipt of these letters of April 6, 1908, state whether or not you knew that it was necessary for you to make out any further formal proofs of loss," and the second exception is to the refusal of the court to permit the question to be answered. A party cannot profit by his own neglect, and, in the absence of fraud or mistake, the plaintiff was bound by the terms of his contract, whether he was familiar with them or not. In Hartford Fire Ins. Co. v. Keating, supra, the court said: "The law assumes that parties understood the words they have used, and therefore unless there are potential reasons to the contrary, they are bound by the legitimate and usual meaning of the phrases they employ."

The third exception is to the refusal of the court to allow the plaintiff on re-examination to answer the following ques-

tion: "Will you state whether or not, just before you went to see Mr. Rosenbush, you had received any notice from anybody that the Caledonian was going to refuse to pay these policies?" We do not see the object of this question. The plaintiff went to see Mr. Rosenbush just before he received the letters from Mr. Bond, and long after the 60 days had elapsed and after the alleged waiver of the proofs of loss, and the fact that he then received the same information that he received a few days later by the letters from Mr. Bond would have been immaterial. It was not necessary for him to account for his going to see Mr. Rosenbush. Whether he went because he had been told that the defendant would not pay the loss, or because he had not heard from Mr. Bond, was not important. After having waited, under the circumstances, as long as he did without hearing from Mr. Bond, it was only natural that he should have consulted an attorney, and the fact that he did so after getting the information suggested in the question would not have reflected upon any of the issues of the case.

The question as to the effect of the riders, making a loss payable "to the assured as interest may appear," which we have already determined, was raised by plaintiff's replications to pleas alleging forfeiture of the policies under the sole ownership clause and the provisions requiring the interest of the assured to be stated, etc. The defendant demurred to one of the replications in each case, which demurrers were overruled, and filed a rejoinder to the other replications to which the plaintiff demurred, and the court sustained the demurrer. The plaintiff did not further reply to or join issue on the replications, but the case was tried on issues joined on other pleas, replications, and rejoinders. The question having been determined by the court below, by its rulings on the demurrers to plaintiff's replications and to defendant's rejoinder, and its ruling on defendant's first prayer, in favor of the appellant, it is not strictly before us on this appeal, but as it goes to the right of the plaintiff to recover at all, and will arise on a retrial of the case, it would be useless to remand the case for a new trial if the contention of the appellee is correct, and it is proper that it should be disposed of. 1

Poe's P. & P. 710; Walter v. Wicomico Co., 35 Md. 395; Boehm v. Baltimore, 61 Md. 261; Lycoming F. Ins. Co. v. Langley, 62 Md. 196; McElroy v. John Hancock L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

The question presented by the defendant's demurrer to the replication to the fifth plea in the second case, and by its third prayer, which was also decided in favor of the appellant, while it only relates to the plaintiff's right to recover on one of the policies, will necessarily arise on a second trial of the case and ought to be disposed of also. The court below held, and we think properly, that as the buildings had not been completed at the time of the issuing of the policy and at the time of the fire, and were therefore unoccupied, the effect of the agreement annexed to the policy, giving permission to make completions, was to waive the provisions of the policy and warranty, requiring them to be occupied, until they were completed. It is not a question of the authority of the agent who saw the property and delivered the policy to waive any of its provisions, but of construction of the contract. The houses had not been completed and were not occupied at the date of the policy, and the agreement added to the policy, signed by an agent authorized to execute and issue it, gave the insured permission to complete them.

Under such circumstances, what is the proper construction of the contract? In view of the fact that they had not been completed, what does the permission granted mean? The provision of the contract relied on by the appellee can only apply to houses that are completed and ready for occupancy, and it would be an empty statement to say to the insured, "You have permission to complete houses that are already completed." On the other hand, a policy containing such conditions, issued to cover buildings not completed, would be void (after the 10 days' vacancy allowed), in the absence of some agreement suspending the operation of the conditions until they had been completed. There is nothing in the terms of the permission granted limiting it to 10 days, and the only reasonable construction of the contract, and one that will give effect to the provisions relied on and the permission granted, is that the conditions were not intended to apply

until the houses were completed and ready for occupancy. We said, in the opinion delivered by Judge Burke, March 2, 1910, in the case of Stevens v. Clarke, 77 Atl. 307: "It is needless to quote authorities to show that in the construction of a contract the intention of the parties as it appears from the whole agreement must be ascertained and given its full effect. The rule of construction was stated, with great clearness, in Nash v. Towne, 5 Wall. 699, 18 L. Ed. 527, as follows: 'Courts, in the construction of contracts, look to the language employed, the subject-matter, and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and in that view they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.' " The same rule was stated in Dodge v. Hughes Co., 110 Md. 374, 72 Atl. 1036. In 19 Cyc. 727, referring to provisions avoiding the policy in case the property becomes vacant, it is said: "Despite such general provisions, the real contract may have been that the premises were insured as vacant premises. In this event forfeiture clauses permitted to remain in the policy form have no application."

In the case of Louck v. Orient Ins. Co., 176 Pa. 638, 35 Atl. 247, 33 L. R. A. 712, the property was described as occupied by the insured as a distillery, and the policy contained a provision that if the subject of insurance was a manufacturing establishment, the policy should be void "if it cease to be operated for more than 10 days." The distillery was not in operation at the date of the policy or at the time of the fire, and had not been for several years, and the company claimed that the policy was void under the provision referred to, but the court said: "It was a distillery, and intended by the owner as such, but not operated, and he did not know when it would be started. He occupied it then as he had for years before, and as he did for months afterwards, although in the whole time he did not distill a quart of whisky. And, without misrepresentation or concealment, this is just

what the company, by its policy, insured—an occupied, idle distillery—no matter what the scope of the authorities of its agent. The agent did not frame the policy and insert the description. That is the company's instrument. Every contract must be interpreted in view of the subject of it, and the surroundings of the parties at the date of it."

The question presented by the defendant's fourth prayer may not arise on the second trial, and will not be considered.

It follows from what we have said that there was error in the ruling in the fourth bill of exception, and in the granting of defendant's second prayer, and that because of these errors, the judgment of the court below must be reversed and case remanded.

Judgment reversed, with costs, and new trial awarded.

FREEDMAN v. PROVIDENCE WASHINGTON INS. CO.

Supreme Court of Pennsylvania. May 11, 1896. 175 Pa. St. 350.

Calling for Proofs. Estoppel.

Fell, J. In an action by the same plaintiff (Freedman) against the Fire Association of Philadelphia, reported in 168 Pa. St. 249, 32 Atl. 39, it was held that a policy of fire insurance procured upon the representation that the property insured was owned by and in charge of a successful business man, when in fact the title was in a married woamn, who exercised no supervision over it, was invalid; and in that case it was held that there was no evidence of a waiver by the defendant of the right of forfeiture. This action is founded upon another policy which covered the same property. The testimony, however, is different. On the trial of the former action there was no denial that the policy had been issued under the belief, based upon representations made by the agent of the plaintiff, that the goods insured were owned by a man who

was personally conducting the business. In this case there was testimony to the effect that the policy had been issued with knowledge upon the part of the company that the goods were owned by Mrs. Freedman. This raised an issue of fact, which carried the case to the jury. The submission, however, included also the question of estoppel. The jury were instructed that, if they believed that the policy was procured by false representations, they should then determine whether the company had ratified it, or was estopped from denying its validity. In substance, the instruction was that if the company, with knowledge of the fraud, had required the plaintiff to procure proofs of loss and to incur expenses, it could not deny that it was bound by the policy. The part of the charge covered by the eighth assignment of error is, "Now, if that policy was void on account of fraud, and the defendants had a right to claim it so, then they had no right whatever to compel the plaintiff to procure proofs of loss, or anything else." That covered by the ninth assignment is: "Now, in order to estop the company, they must have known the facts. They must have known that this was a married woman, and they must have been acquainted with all the facts, in order for them to estop themselves. If they did know the facts, and required the plaintiff to do what she would not otherwise have done—required her to go to an expense which she would not otherwise have incurred,—if they did, knowing the facts, require this, then they are estopped from denying that they were bound by the insurance." This instruction raises the only question now to be considered. The testimony of the plaintiff's witness on the subject is this: The fire occurred March 15, 1892. Mr. Little, the special agent of the insurance company, called at the plaintiff's store in Athens, Bradford county, and asked Bernard Freedman, the plaintiff's husband, if she was at home, and was informed that she was. He then asked to see the books and papers relating to the business which had been conducted at the Laceyville store, where the fire occurred. These were produced by Mr. Freedman, who went with Mr. Little to the office of Mr. Tidd, an insurance agent, in the town. There they examined the papers, and Mr. Little asked Mr. Freedman whether he had ever failed and been sold out,

and how long his wife had been doing business in her own name, and how much money she had when she started doing business. To the last inquiry, Mr. Freedman replied, "I don't think it is any of your business." And Mr. Little said, "If it is none of my business, we will get even with you." It appears that at this interview an offer of settlement was spoken of, but the above is all of the conversation that is given. Later in the day, Mr. Little called at Mr. Freedman's store, and asked him if he had informed his wife of the offer made. He replied that he had not, because he knew that she would not accept it, and Mr. Little then said, "Well, if that is the case, go on and make out your proofs of loss." With that the parties finally separated. Proofs of loss were furnished. On June 3d, Mr. Little wrote to the plaintiff, calling her attention to the requirement of the policy that the certificate of a magistrate should be appended to the proofs, and notifying her that this requirement must be complied with. The letter closed with this sentence: "The Providence Washington Ins. Co. does not waive any of its rights or conditions under said policy 918." The certificate was sent, and on June 14th Mr. Little again wrote, acknowledging its receipt, and asked that the bills, or duplicates thereof, showing dates and places of purchase and prices paid for goods, be procured. These letters were addressed to "R. Freedman, Madam." This is all that took place between the parties after the fire, and before suit was brought, and it is the only evidence upon which an estoppel can be based.

It is by no means clear from the evidence that at this time Mr. Little knew what representations had been made at the time the insurance was procured, but, assuming that the defendant had knowledge of them, was there any ground of estoppel? In Freedman v. Association, 168 Pa. St. 249, 32 Atl. 39, it was said that the call for the magistrate's certificate would be evidence, under our cases, of a waiver of other defects in the proof of loss, and that it might raise the question of the right to defend for the breach of other conditions, or for the failure of the plaintiff to take steps which were merely formal prerequisites to a suit; and attention was called to the distinctions pointed out in the opinion of the court in Gould v.

Insurance Co., 134 Pa. St. 570, 19 Atl. 793, and McCormick v. Insurance Co., 163 Pa. St. 184, 29 Atl. 747. The subject was not as fully considered as it would have been had a new venire been awarded, and the question thus left to be raised again in the case. Waiver of the proofs of loss may be inferred from acts of the insurer which show a recognition of liability, or a denial of liability exclusively on other grounds. Insurance Co. v. Dougherty, 102 Pa. St. 568; Insurance Co. v. Erb, 112 Pa. St. 149, 4 Atl. 8; Snowdon v. Insurance Co., 122 Pa. St. 502, 16 Atl. 22. And the failure of the insurer to give notice of objections to the proofs of loss furnished within the stipulated time, and intended as a compliance with the requirements of the policy, is evidence of a waiver of defects. Gould v. Insurance Co., supra. The reason for the rule, and the distinction between an attempted compliance with the requirements of the policy and a failure without valid excuse, are fully pointed out in the case last cited, and it is said in the opinion: "In establishing this rule in regard to the conduct of insurance companies as to objections to proofs of loss, it is not intended to encroach at all on the doctrine of waiver by estoppel, as laid down in the well-considered and authoritative cases of Trask v. Insurance Co., 29 Pa. St. 198; Beatty v. Insurance Co., 66 Pa. St. 9,— and others of the same kind." In most of the cases in which it has been held that an insurance company, by specifying one ground of defense, was estopped from asserting other grounds at the trial, the failure of the insured has been in not complying with a condition precedent to the right of action; and they come within the rule stated in Gould v. Insurance Co., supra, or were decided upon the ground of express waiver. In McCormick v. Insurance Co., supra, by mutual understanding of the parties, the only matter in controversy between them was the ownership of the property destroyed. All other grounds of defense had been relinquished. Suit having been brought with this understanding,—to determine the question of ownership, and nothing else,—it was held that the company should not be permitted to defend on the violation of a clause in the policy regulating the manner in which the lumber should be stored. In this case the agent of the insurance company

specified no particular ground of defense. He made inquiries as to the extent of the loss, the value of the goods destroyed, and proposed a settlement. When this was refused he notified the plaintiff to go on and make out her proofs of loss. He did nothing to mislead her, to place her in a worse position, or to cause her to incur any expense which she would not have been obliged to incur had he remained silent. We see in this no evidence whatever from which an intention to waive any ground of defense can be inferred. In the opinion in Welsh v. Assurance Corp., 151 Pa. St. 607, 25 Atl. 142, Mitchell, J., in speaking of the denial of liability for specified reasons as a waiver of other defenses, says: "The only ground upon which such a result can rest is estoppel. No party is required to name all his reasons at once, or any reason at all; and the assignment of one reason for refusal to pay cannot be a waiver of any other existing reason, unless the other is one which could have been remedied or obviated, and the adversary was so far misled, or lulled into security, by the silence as to such reason, that to enforce it now would be unfair or unjust. Insurance Co. v. Brown, 128 Pa. St. 386, 18 Atl. 389. The whole doctrine depends on estoppel, and the essential feature of it is loss or injury to the other party by the act of the party to be estopped. In this respect there is nothing peculiar about actions upon insurance policies. They stand on the same footing as other litigation." Waiver is essentially a matter of intention, and to establish it there must be some declaration or act from which the insured might reasonably infer that the insurer did not mean to insist upon a right which, because of a change of position induced thereby, it would be inequitable to enforce. Beatty v. Insurance Co., 66 Pa. St. 9; Insurance Co. v. Brown, 128 Pa. St. 386, 18 Atl. 387. In the latter case it was distinctly held that the making of an offer of settlement, or the failure to state in the affidavit of defense all the grounds of defense relied upon, did not justify the inference of a waiver. The judgment is reversed, with a venire facias de novo.

DEMING INV. CO. v. SHAWNEE FIRE INS. CO

Supreme Court of Oklahoma. Sept. 6, 1905. 16 Okl. 1.

Agent, Waiver. Parol Evidence. Estoppel.

Beauchamp, J. This action was commenced by plaintiff in error against defendant in error in the district court of Cleveland county to recover upon a fire insurance policy, issued by the defendant in error to the plaintiff in error, covering the dwelling house situated upon a farm in Cleveland county, which was totally destroyed by fire. Trial was had in that court, resulting in a judgment for the defendant in error for costs. A motion for a new trial was heard and over-ruled by the court. Exceptions saved, and plaintiff in error brings the case here by peition in error and case-made for review.

At the trial of the case the parties stipulated relative to certain facts, which stipulation is as follows: "It is hereby stipulated and agreed by and between the plaintiff and defendant that at the time of the making of the application in writing for the insurance involved in this action, and at the time of the writing of the policy, that the Deming Investment Company, plaintiff herein had been the defendant in an action commenced by Lulu Davidson, as the next friend of the minor heirs of John Davidson, deceased, involving the land upon which the buildings insured by the policy involved in this case is situated, in Cleveland county, Okl.; that in said action the Deming Investment Company as one of the defendants, filed its answer by way of cross-petition for the foreclosure of a second real estate mortgage, upon said premises, executed by John D. Davidson and Lulu Davidson, husband and wife, in which said case Jane Lyons was one of the defendants and by answer discloses that she was the owner of a mortgage on said real estate described in said policy of insurance, by an assignment from the Deming Investment Company, plaintiff herein, for the sum of $1,000; that in said action the Deming Investment Company recovered a judgment for the amount claimed by way of foreclosure of said second mortgage, and that said judgment was subject to a first mort-

gage of which Jane Lyons was the owner, and assigned from the Deming Investment Company; that thereafter execution was issued on the said judgment, the property was advertised by the sheriff of Cleveland county, and sold subject to the mortgage of Jane Lyons, the Deming Investment Company becoming the purchaser at said sale, and that thereafter on motion of the purchaser the Deming Investment Company, the sale was confirmed in the Deming Investment Company, and approved by the district court of Cleveland county; that thereafter an appeal was prosecuted in said cause to the Supreme Court of the territory of Oklahoma, which said appeal was pending in the Supreme Court of the territory of Oklahoma at the time the insurance was applied for in this action, to wit, the 22d day of November, 1901, and at the time said policy involved in this action was issued, on, to wit, the same date; that thereafter the Supreme Court of the territory of Oklahoma by a proper mandate dismissed the said appeal prosecuted by the said heirs of John Davidson, for the reason that the case-made was not made and served within the time allowed by the court, and as prescribed by law therefor, affirming the judgment of the confirmation of the district court appealed from, which said mandate was spread upon the records of the district court of Cleveland county after the policy of insurance was issued the plaintiff herein, and thereafter the district court of Cleveland county directed the then sheriff, by proper order, to make and execute to the Deming Investment Company a deed for said premises, said order being made on the 2d day of December, 1901, as shown in Journal 6, pp. 541, 542, which order is here referred to, and the recitals therein are agreed to, and which order is as follows, to wit:" [Here follows the order of the district court of December 2, 1901, directing the sheriff to execute a deed to defendant in error.]

November 26, 1901, the plaintiff in error entered into a written contract with Samuel F. Sewell, in consideration of the sum of $3,800, to sell and convey to him the land upon which the house covered by the insurance policy was situated, which contract recited the court proceedings mentioned in the stipulation hereinbefore set out, and provides that as soon as a proper judgment could be obtained in

the district court in conformity to the mandate of the Supreme Court that would enable the plaintiff in error to procure a sheriff's deed to the land, and the court should hold that another suit then pending did not create a cloud upon its title, the plaintiff in error would immediately thereafter make and execute a warranty deed to Sewell upon payment to it within 20 days thereafter of $3,800, less $250 paid; the receipt of which is acknowledged. And it is further provided that if the plaintiff in error did not acquire and furnish to Sewell a good title to the land on or before February 1, 1902, it would upon demand, return to Sewell the $250, with interest thereon at the rate of 6 per cent. per annum. The house was totally destroyed by fire on the evening of December 4, or morning of December 5, 1901. The deed was executed by the sheriff to plaintiff in error December 7 or 8, 1901, after the fire. A deed to Sewell was executed by plaintiff in error before the fire, but not delivered until December 30th, after the fire, at which time Sewell made a further cash payment, and executed a mortgage for deferred payments.

The petition in error contains five assignments of error under which the questions involved herein and argued by counsel in their briefs are as to whether the insurance policy was invalidated:

First. By reason of certain misstatements in the written application, signed by the insured. The insurance policy involved was written by A. Kinkaid, who was at the time local agent for defendant at Norman, with power to solicit insurance and to receive applications therefor, and with power to write and countersign policies of insurance as such agent, subject to the approval of the defendant. That before writing the policy he was requested to get insurance on the building by Mr. Rule of Okahoma City, agent for plaintiff. Kinkaid was at the time of writing the policy acquainted with the property to be insured, and familiar with all the conditions of the title of the plaintiff in the land; that at the time he wrote and signed the policy he prepared and wrote an application on the form used by the defendant, from his personal knowledge of the facts with reference to the property, and forwarded by mail to Mr. Rule at Oklahoma City, to be signed by him as

agent for plaintiff if found correct, which, when received, was signed by Mr. Rule, and returned to Mr. Kinkaid. Contained in the application is the following:

"(18) Is the title in your own name? If other than fee simple title, what kind of a title have you? Explain fully. A. Property was sold under forclosure. Court has ordered sheriff to make deed to this Company. Plaintiff made appeal to Supreme Court which causes delay in issuing deed.

"(20) Is it encumbered in any way? If so how much and when due? A. The entire incumbrance is None. No.

"It is understood by the applicant that the company will not be bound by any representation of the applicant, or promises of the agent not contained herein, and any subsequent incumbrance, insurance, change of ownership, occupancy, or premises becoming vacant without consent of the company, will render the policy void. Having read the foregoing application and fully understanding its contents, I warrant it to contain a full and true description and statement of the condition, situation, value, occupancy, and title of the property hereby proposed to be insured, and I warrant the answer to each of the foregoing questions to be true; and I agree that this insurance shall not be binding on said company until approved by its secretary."

That the application misstated the facts is not disputed, but it is argued by plaintiff that in view of the facts that the agent of the defendant, who wrote the policy, wrote the application, and was at the time informed as to the true condition of the title of plaintiff, that the defendant cannot now be heard to deny the validity of the policy for reason of such misstatements; Mr. Kinkaid testified that he knew of the Lyon mortgage and the condition of plaintiff's title at the time that he wrote the policy and application. It is not shown or claimed that the knowledge of Kinkaid was ever communicated to the defendant, or that it had any actual knowledge of the condition of plaintiff's title before the building was destroyed by fire, other than that contained in the application. The policy contains the following provision: "If an application, survey, plan, or description of property is taken, it shall be a part of this contract and warranty by the insured." And it further provides: "This entire policy shall be void if the insured has

concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein." Under the express provisions and conditions of the application and policy, the application is made a part of the contract of insurance, and the defendant warranted its answers to the questions in the application to be true, and it cannot now be permitted to say that it was ignorant of its contents, in the absence of fraud or mistake, so that unless the conduct and knowledge of defendant's agent as to the condition of the title of the plaintiff would be held to be a waiver of the stipulated warranty, then the contract of insurance is invalidated, and the plaintiff cannot recover, for it will not be disputed that a misrepresentation by an applicant for a policy of fire insurance, in his application as to his title to the property insured, avoids the contract of insurance as to the property covered by the policy.

The case of American Insurance Co. v. Gilbert, 27 Mich. 429, was a case in which there was a misrepresentation in the application as to the value of the property insured. When the insurance was applied for the agent of the insurance company personally inspected the property and knew its true value but wrote into the application, which was signed by the applicant, the valuation in excess of the true value, and which was known by the applicant not to be a true statement of its value. We quote from the syllabus: "An applicant for insurance cannot escape responsibility for the statement of facts which he inserts himself in the application, or permits an agent of the insurer to insert as his, upon which he is just as well informed as the agent himself, such as the condition, situation, and value of his own property to be insured, by showing that he was induced by such agent, knowingly and against his own judgment, to state them falsely."

The case of New York Life Insurance Company v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, 29 L. Ed. 934, was a case wherein a person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written

down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading and by the agent transmitted to the company, and the company thereon assumed the risk. It was conditional in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal. Held, that the policy was void. The opinion of the court was delivered by Mr. Justice Field, and we quote from a portion of the opinion: "It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name is signed; that he truthfully answered those questions; that false answers written by an agent of the company were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovery. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract, which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon, and induced to

enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be canceled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the preimums paid, and to that only would be entitled to by virtue of the statutes of the state of Missouri. But the case presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if the party making written proposals for a contract, with representations to induce its execution, should be allowed to show after it had been obtained, that he did not know the contents of his proposal and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove, not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the right of the company could in no respect be affected by his verbal statement, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed. In Globe Insurance Co. v. Wolff, 95 U. S. 327, 24 L. Ed. 387, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be

given to the provision except so far as the subsequent acts of the company permitted it to be disregarded. In Insurance Co. v. Norton, 96 U. S. 240, 24 L. Ed. 689, the policy contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures, and this court held, that the company could have insisted upon those terms had it so chosen. * * * The present case is very different from Insurance Co. v. Wilkinson, 13 Wall. 222, 20 L. Ed. 617, and from Insurance Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593. In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that the parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to effect the insurance, 'as the full and complete representative of the company in all that is said or done in making the contract'; and the court held that the powers of the agent are prima facie co-extensive with the business intrusted to his care, and would not be narrowed down by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may be well that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements."

In the case of the Northern Assurance Company v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, Mr. Justice Shiras delivered the opinion of the court, and, after citing from a number of New York cases, uses the following language: "It is doubtless true that in several later cases the New York Court of Appeals seems to

have departed from the principles of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other parties. Robbins v. Springfield Fire Ins. Co., 149 N. Y. 484, 44 N. E. 159; Wood v. American Fire Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733. But see Rohrbach v. Germania Fire Ins. Co., 62 N. Y. 63, 20 Am. Rep. 451, and Owens v. Holland Ins. Co., 56 N. Y. 565, which are irreconcilable. The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place."

There is no evidence in the record to show that Kinkaid, the local agent, either before or after he had delivered the policy and received the premium, communicated with the insurance company the true condition of the title of the plaintiff to the property insured, or that he at any time informed the company that the property insured was incumbered by

mortgage in the sum of $1,000, or any other sum, or that the company, previous to the destruction of the property by fire, had any knowledge whatever of such incumbrance. The purpose of the application was to inform the insurance company of the facts with reference to the property sought to be insured, and to furnish it information upon which it was to act in accepting or refusing the risk; and the stipulation in the application and policy, that if any of the statements made in the application were untrue, the policy should be void, was a reasonable stipulation, and if the plaintiff had referred to the policy issued and delivered to it, it would have found by the provisions thereof that the same was void if it concealed or misrepresented any fact or circumstance concerning the insurance or subject thereof, or if it had not stated truly its interest in the property insured, and that the policy was made and accepted subject to the stipulations and conditions therein contained, and that no agent or officer of the insurance company had power or should be deemed to have waived any of the provisions or conditions of the policy, unless such waiver should be in writing and attached to the policy. The application after being filled out by the agent of the insurance company was forwarded to the agent of the plaintiff to be signed as such agent, if found correct. The mere fact that the answers to the questions contained in the application were written out by the agent of the insurance company did not relieve plaintiff's agent from the duty or necessity of examining the same, and to seeing to it that the statements in the application were true. In the case of Liverpool & L. & G. Ins. Co. v. Richardson Lumber Co., 11 Okl. 585, 69 Pac. 938, the rule is stated: "Where the waiver relied upon is the act of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the unauthorized action of the agent."

There is no evidence to show, nor is it claimed by the plaintiff, that defendant had any knowledge of the Jane Lyons mortgage, or that the statement in the application for insurance, that the property was not incumbered, was false. Kin-

kaid was an agent, with powers strictly defined and limited by the express terms of the contract of insurance, and could not act so as to bind the defendant beyond the scope of his authority. The question here presented is not as to whether the insurance company by either its officers or agents could waive the conditions and stipulations in its policy, but is a question as to the competency of the evidence to prove such waiver. The contract of insurance is fully set forth in the policy, and it is expressly provided by its terms that no waiver or stipulation shall be considered except the same be in writing, and attached thereto, and that no representation of any agent shall be binding unless set forth in writing. As we understand, it is not pretended that by any language or declaration of Kinkaid, the agent at the time the policy was delivered and the premiums paid, claimed to have power to waive any provisions or conditions of the policy. The contract was in writing, and in clear and unambiguous terms provided that the answers of the plaintiff contained in its application were warranted to be true, and that the entire policy should be void, if the interest of the insured in the property were not truly stated, and that no officer, agent, or other representative of the company, had power to waive the provisions and conditions of the policy, except in writing, and attached to the policy; so that to hold that the conditions and stipulations in the policy had been waived by the knowledge and conduct of its agent would be to violate the well-settled principles declared by the former decision of this court in the case of Liverpool & L. & G. Ins. Co. v. Richardson Lumber Co., supra, wherein it is held: "A contract in writing if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance."

But it is insisted by counsel for plaintiff in error that the statements in the application for insurance in this case are not warranties, but only misrepresentations of facts which did not affect the insurance company in its action; and that the written application is not made a part of the policy, or referred

to therein. By the express terms of the policy the application is made a part of the contract of insurance, and by the terms of both the application and policy the statements contained in the application are stipulated warranties. The parties had a right to make their own contract upon terms and conditions in this respect as they saw fit, and, if the plaintiff chose to make his representations warranties, the question of their materiality becomes unimportant; for under such stipulation the defendant was relieved from showing, and the plaintiff was estopped from denying, that they were material to the contract, and we are not permitted to say that the defendant did not deem them material to the risk, or that it would have made the contract upon other terms than it did. The secretary of the insurance company testified that the matter of incumbrance was material; and, had the company have had any knowledge of the incumbrance, it would not have issued the policy. And it may be that from experience he may be satisfied that the matter of incumbrance upon property sought to be insured is material to the risk, and, while this materiality he may not be able to prove to the satisfaction of the court or jury, he has a right to refuse to insure property incumbered, and to insist that the statements of the applicant in his application as to such matters shall be a warranty by the insured to be true; and when, as in this case so made, it was an agreement on the part of the plaintiff not only to warrant the truth of such matters, but that they are material to the contract, and that if false, the contract shall be void, therefore all the statements, representations contained in the application, must be treated as warranties, and must be true to authorize a recovery upon the policy. American Ins. Co. v. Gilbert, supra; Phœnix Life Ins. Co. v. Raddin, 120 U. S. 183-189, 7 Sup. Ct. 500, 30 L. Ed. 644; Northern Ins. Co. v. Grand View Building Ass'n, supra.

Again the pleadings in this case contain not a word in reference to the knowledge, acts or conduct of Kinkaid, which it is contended estops the defendant from denying the validity of this policy. The petition simply declares upon the policy of insurance, the loss by fire, and the refusal of payment. The answer of the defendant alleges that a material

condition of the contract had been broken; that the policy of insurance was issued by the defendant in the belief, and upon the plaintiff's special warranty that the answers to all of said questions were true; that at the time that the application was issued and the policy written, the answers were false, and that the rights of the assured under the policy had been forfeited. The plaintiff replied by a general and special denial of the matters contained in the answer, and alleged that the loss set out in plaintiff's petition is a total loss, and that, under the laws of the territory, defendant was required to pay plaintiff by reason of said policy and said loss, the face of the policy. Under our Code, the facts relied upon as a ground of action or of defense must be clearly and concisely stated, and a definite issue presented, so that the opposite party may be fairly notified of what he is required to meet. Under the pleadings as they exist, evidence could not be received to establish the acts, conduct, or knowledge of Kinkaid relied on as an estoppel. All acts, representations, and conduct, relied on as an estoppel, should be specially pleaded before evidence to establish the same can be received. Tonkawa Milling Co. v. Town of Tonkawa et al., 83 Pac. 915 opinion handed down at this sitting, and cases therein cited; Dwelling House Ins. Co. v. Johnson et al., 47 Kan. 1, 27 Pac. 100, and other cases cited.

Having reached the conclusion that under the provisions and terms of the contract of insurance sued upon, and under the pleadings, that the plaintiff cannot recover for the reasons stated, it will not be necessary to consider the other questions raised.

The judgment of the district court of Cleveland county is affirmed, with costs to plaintiff in error.

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The judgment of the district court of Cleveland county is affirmed, with costs to plaintiff in error.

PEARLSTINE et al. v. PHŒNIX INS. CO.

Supreme Court of South Carolina. April 18, 1906. 74 S. C. 246.

Knowledge of Agent.

Woods, J. This action was brought by T. W. Pearlstine, styling himself trustee for S. W. Pearlstine, and S. W. Pearlstine in his own right, on a fire insurance policy, appearing on its face to have been issued to T. W. Pearlstine individually. The policy was for $1,200, and no question arises in this appeal as to the destruction by fire or the value of the stock of merchandise and store fixtures which it covered. The portions of the complaint to which the appeal relates are: (1) the allegation that "the plaintiff S. W. Pearlstine had an interest in the property insured as the owner thereof," etc., and (2) "that the said policy of insurance was issued by the defendant and delivered to the plaintiff S. W. Pearlstine, in the name of the plaintiff T. W. Pearlstine, for the sole use, benefit, and protection of the plaintiff S. W. Pearlstine, and with the full knowledge and consent of the defendant." According to the testimony of S. W. Pearlstine, offered in support of these allegations, the goods and fixtures insured were owned by him in a business which he conducted under the name of T. W. Pearlstine, and he made known these facts four years before the fire to Folk, the agent through whom the insurance policy now in issue was procured. At that time, however, the policy obtained from Folk was issued by the Pacific Insurance Company, and the witness said he did not know whether Folk was then agent of the defendant company or not. With this foundation the plaintiff offered an insurance policy issued by the defendant company to T. W. Pearlstine on a stock of goods described in the policy as being in "one shingle roof frame building, while occupied by assured as store, situate No. 430, on the last side of Bamberg street, Block No.——Bamberg, S. C." This was the same description given by S. W. Pearlstine of the building wherein he kept the stock of goods referred to in his evidence as owned by him, in a business conducted by him in the name of T.

W. Pearlstine. Objection being made to the introduction of the policy, the court ruled as follows: "One objection makes this point, that the policy is issued solely to T. W. Pearlstine. I would like to know from plaintiff's counsel under what allegation of the complaint they are going to get this in. Of course, any policy issued or paper introduced must be in accordance with the allegations of the complaint, otherwise it is not competent or relevant. I am satisfied the policy cannot be introduced. It will have to be reformed in a court of equity first. It cannot be varied by parol testimony. This is a court of law, and plaintiff is suing upon a written contract and you cannot vary or explain it."

Without going further into the details of the evidence offered and rejected, it will be sufficient to say the circuit court held: first, that an express trust cannot be proved by parol, and rejected all evidence offered to prove that T. W. Pearlstine was merely a trustee for S. W. Pearlstine, the real owner; and second, that parol evidence would not be received to establish that a policy of insurance issued in the name of T. W. Pearlstine individually covered property which was known by the insurance agent before the policy was issued not to belong to him, but to S. W. Pearlstine, doing business as T. W. Pearlstine, and that the insurance was for the benefit of the real owner. After the exclusion of the policy and parol evidence on these points, the circuit court directed a verdict for the defendant, which was a proper instruction if the evidence offered was incompetent. We think, however, the evidence should have been admitted. The policy provided: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement, indorsed hereon or added hereto, and as to such provisions or conditions no officer, agent, or representative shall have power or be deemed or held to have waived such provisions or conditions unless such a waiver, if any, shall be written upon or attached thereto,

nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written or attached." It also contained this stipulation: "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void * * * if the interest of the assured be otherwise than unconditional and sole ownership." It cannot be doubted the circuit court was in error in holding an express trust in personal property cannot be proved by parol evidence. Harris v. Bratton, 34 S. C. 259, 13 S. E. 447.

2. On the second point, the views of the circuit court were in accord with a line of decisions in this country, which hold that it is not competent to show by parol evidence that a condition stated in an insurance policy as essential to its validity was known by the local agent not to exist at the time the policy was issued, when the policy provides that no officer or agent shall have power to waive any of the conditions of the policy except by written indorsement thereon. This view is stated and maintained with great force in Northern Assurance Company of London v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, where the authorities in its support, both English and American, are reviewed. But the rule adopted in this state and the large majority of the states of the Union is that an insurance company cannot avail itself of provisions in the policy that it should be void if certain facts therein mentioned as essential to the insurance should be found not to exist when these facts were known to the agent not to exist when the policy was issued through him, and the existence of such facts and the knowledge of the agent may be proved by parol. Pelzer Mfg. Co. v. Sun Fire Ins. Co., 36 S. C. 213, 15 S. E. 562; Graham v. Insurance Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707; Gandy v. Insurance Co., 52 S. C. 224, 29 S. E. 665; Schroeder v. Insurance Co., 51 S. C. 181, 28 S. E. 371.

3. The defendant insists, however, that even under this view the circuit judge was right in excluding the policy, because there was no evidence of notice to Folk as its agent that the property belonged to S. W. Pearlstine when he issued the policy in the name of T. W. Pearlstine. This ground of

objection to the admission of the policy was not taken in the court below, and it would not be fair to plaintiffs to consider it here, if for no other reason, because the plaintiff might have supplied the evidence of notice if it had been interposed.

It is the judgment of this court that the judgment of the circuit court be reversed, and the cause remanded to that court for a new trial.

CAMPBELL v. SUPREME LODGE KNIGHTS OF PYTHIAS OF THE WORLD.

Supreme Judicial Court of Massachusetts. Worcester. May 21, 1897. 47 N. E. 109.

Waiver of Forfeiture.

Allen, J. The decision of this case depends upon the construction to be given to the following provisions of the revised general laws of the defendant: "The secretary of a section shall forward to the board of control the monthly payments and dues collected, immediately after the tenth day of each and every month. If such payments and dues are not received by the board of control on or before the last day of the same month, the section so failing to pay, and all members thereof, shall stand suspended from membership in the endowment rank, and their certificates, and all right, title, and interest therein, shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the board of control to the president and secretary of such section: Provided, that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all rights as a section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from the suspension of warrant said section shall pay to the board of control the amount of all monthly payments, as-

sessments, or dues accrued upon said members." There was also another provision of the general laws, as follows: "Officers of sections are the agents of the members, and shall in no wise be considered as the agents or representatives of the board of control of the endowment rank or of the supreme lodge." Campbell, the member whose right is here involved, had duly paid all his assessments, including that for February, 1895, to the secretary of his section, but the secretary had failed duly to forward the collections for that month. But on Friday, March 1, 1895, he mailed the same to the board of control at Chicago, in an envelope furnished for that purpose by said board, with the full address of said board printed thereon. This letter was received at the Chicago post office on Sunday morning, March 3d, at 4 a. m., and was delivered by a mail carrier at the office of the board of control on the morning of Monday, March 4th. The board of control on the same day sent a receipt for the money, which was expressed to be on condition that all the members for whom the payment was made were living at the date of the receipt. Campbell died Sunday, March 3, at 10 a. m. The only question presented to us is whether, before the death of Campbell, the members of said section, and Campbell as one of them, had regained their rights and privileges held previous to the suspension and forfeiture, by reason of the mailing of the letter to the board of control on March 1st. It is admitted that a suspension of membership and forfeiture occurred at the expiration of the last day of February, by reason of the board of control not having received the February dues. But the plaintiff contends that by the terms of the general law the defendant offered to restore members to their full rights if within 30 days their section should pay the monthly dues; and that upon the mailing of the letter of March 1st this offer became a complete and binding contract, and that the payment was made on that day. It has been held that where an agent to collect money or a debtor has been authorized, either by express direction or by a course of dealing, to remit money by mail, and deposits a letter containing such money in

the post office, the money is thenceforward at the risk of the creditor. Buell v. Chapin, 99 Mass. 594; Gurney v. Howe, 9 Gray, 404; Crane v. Pratt, 12 Gray, 348; Morgan v. Richardson, 13 Allen, 410. But the present case does not fall within that rule. Here a forfeiture had occurred. The members had the privilege of becoming reinstated upon making payment. They might or might not avail themselves of this privilege. By the earlier portion of the general law the forfeiture occurred if the payments were not received by the board of control on or before the last day of the month. By the latter portion, the members were to regain their rights if within 30 days the section should pay the amount of the assessments and dues to the board of control. Such payment did not become effectual till its receipt by the board of control. The case is much like ordinary cases of insurance, where a forfeiture has occurred through a failure to pay a premium or assessment when due. Acceptance of the money afterwards waives the forfeiture, and restores the policy. Shea v. Association, 160 Mass. 289, 294, 35 N. E. 855, and cases there cited; Bouton v. Insurance Co., 25 Conn. 542. So in beneficiary associations the levy and acceptance of assessments after a forfeiture has the same effect. Rice v. Society, 146 Mass. 248, 15 N. E. 624; Rindge v. Society, 146 Mass. 286, 15 N. E. 628. But in all of these cases there is no intimation that merely mailing the money in a letter will be sufficient to avoid a forfeiture. By the true construction of the general law such reinstatement is not established till the money is paid to the board of control, and this payment is not made merely by depositing a letter containing the money in a post office. Shea v. Association, 160 Mass. 289, 295, 35 N. E. 855. There is nothing in the agreed statement of facts to show that by usage or course of dealing the defendant took the risk of the safe transmission of the money in this manner. On the other hand, the risk fell upon the senders of the money, because, by the terms of the general law, if the payments were not duly received by the board of control, the members were suspended from membership. It is not stated in the agreed facts whether the

amounts were sent by actual money or by check; and perhaps, if it would help the plaintiff, we should assume that the former mode was adopted. But, so far as appears, no loss ever occurred, and no question arose. In the previous instances of delayed payments and waivers, the waivers took effect apparently from the date of the actual receipt of the money by the board of control. No instance is mentioned where a member died between the time when the money was mailed and the time when it was received. Judgment for the defendant.

DOOLY v. HANOVER FIRE INS. CO. OF NEW YORK.

Supreme Court of Washington. Dec. 10, 1896. 16 Wash. 155.

Dunbar, J. This action was brought in the superior court of Yakima county by the plaintiff (appellant herein) to recover from the respondent upon an insurance policy. The policy was issued on the 12th day of June, 1895, in consideration of the payment by the plaintiff to the defendant of the premium of $33.80, the amount of the policy being $1,000 upon building, $200 upon furniture and fixtures, and $1,000 upon stock of wines, liquors, and cigars. The lot upon which the property insured was situated was held by plaintiff under a contract of purchase with one Walter N. Granger, a trustee. The plaintiff testified that, at the time of the issue of the policy, he had paid the purchase price in full, and was entitled to a deed therefor. The building was burned, and a certain amount of fixtures, and stock of wines, liquors, etc., destroyed. No adjustment could be made, and suit was brought to recover the amount of the policy.

The defense in this action, so far as it is necessary to discuss it here, was based upon a condition in the policy which was as follows: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the interest of the insured in the property covered by said policy be other than unconditional or sole

ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if the subject of insurance be personal property, and be or become incumbered by chattel mortgages." This provision of the policy was especially pleaded, and upon the close of plaintiff's testimony, on motion of the appellant, the case was taken from the jury, and dismissed, at plaintiff's cost. No written application was made for this policy, and the undisputed testimony is that no questions were asked the insured concerning the title to the land. It also developed in the trial of this cause that there was a mortgage upon certain of the goods, but the testimony of the plaintiff was to the effect that he made this known to the agent of the insured. The testimony was as follows: "Q. What did you say about this mortgage? A. He wanted to know whether the property was incumbered, and I said it was, and he wanted to know for how much, and I told him I couldn't tell without looking it up,—there was a mortgage on the Zillah property and a mortgage on the North Yakima property to satisfy a debt of Rothchild Brothers. * * * Q. Did he ask you anything about the ownership of the property? A. No, sir. Q. Did you make any statement whatsoever about the ownership of the property? A. No, sir." Further on, in direct examination, after being recalled, the following appears: "Q. Who was the owner of this property that was destroyed? A. I was. Q. Both the real property and the personal property? A. Yes, sir. Q. And the buildings? A. Yes, sir. Q. Now, I want to ask this question,—I am not sure that I covered it entirely: Did you make any statement to Mr. Leeper; that is, the agent? I believe I asked you whether he asked you any questions about the title. A. Yes, sir. Q. And his answer was 'No.' Did you make any statement to him about the title? A. No, sir. Q. None whatever? A. No more than I told him there was a mortgage upon the property. Q. Did you make any statement except about this mortgage on the property,—this mortgage to Rothchild Brothers? A. That is all."

There having been no written application in which questions were asked and answered concerning the status of the

property, we think, under the authorities, and as a question of right, that this condition, which is injected into the policy among numerous other conditions, more or less technical, and hard to understand by the ordinary mind, ought not to prevent a recovery, in the absence of any misrepresentation on the part of the insured. The insured as a matter of fact ordinarily knows nothing about the policy until it is made out and returned to him, after the payments for the same have been made to the agent at the time the contract was made; and the insurer, having failed to obtain this information, must be held to have done so at its peril. Even where an application has been made, which is the instrument to which the insured's attention is especially called, and upon which he relies, it is held that, where the language of the questions contained in the application calls for answers which may be to some extent a matter of opinion, if the insured answers in good faith, he will be excused, though he does not give the desired answer. May, Ins. § 166. The ordinary layman is not presumed to know what a fee-simple title is, and, in the absence of any questions which would tend to enlighten him as to the true definition of that phrase, he might very well conclude that he was the owner in fee simple if he was the owner and in possession, and had such title to the property as is testified to by the assured in this case. Much more liberally ought the language to be construed when it is found in the policy alone, and not in an application, to which the assured is directly a party. "The issuing of a policy," says Mr. May, in the section above referred to, "on an application which, without fraud, contains no answer to certain questions, is a waiver of answer to those questions, even though, in answer to another question, the insured may have said there were 'no other circumstances affecting the risk'; and, to avoid the policy in such cases, the insurers must prove untrue statements other than those inquired about." The rule as announced by Wood, Ins. § 212, is as follows: "When no inquires are made, the intention of the insured becomes material, and, in order to avoid the policy, they must find, not only that the matter was material, but also that it was intentionally fraudulently concealed." And in Insurance Co. v. Bachler (Neb.)

62 N. W. 911, it was held that "where the insured was not questioned as to incumbrances on his property, and did not intentionally conceal the facts, the existence of a mortgage thereon did not invalidate the policy,"—following Van Kirk v. Insurance Co. (Wis.) 48 N. W. 798. The court in that case found that the existence of the mortgage on the property was a fact material to the risk, but that, no inquires having been made by the agent of the insurance company as to the condition of the title to the property, and the insured having said nothing about the existence of the mortgage for the reason that he did not know that it was his duty to disclose the existence of the mortgage, it was not, under the circumstances, a representation that the insured property was free from the mortgage. In O'Brien v. Insurance Co. (Mich.) 17 N. W. 726, it was held that "where insurance is applied for orally, and the applicant is unaware of any provision in the policy regarding incumbrances, and is not guilty of any misleading conduct, his bare silence cannot be deemed a misrepresentation; and if the agent in such a case did not read the policy to the applicant, or call his attention to the clause relating to incumbrances, the existence of a mortgage would be no impediment to a recovery from the insurance company." "If an insurer," said the court, "is apparently indifferent whether a property is unincumbered, and is content to insure without in any way suggesting an interest in the question, the bare silence of the applicant upon it cannot be deemed a misrepresentation." In Clark v. Insurance Co., 8 How. 235, after giving the general rule concerning the answering of questions, the court says: "But the relation of the parties seems entirely changed if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: It must be presumed that the insurer has, in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." And further on the court says: "But when representations are

not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must, in point of law, be deemed to do it at his peril. 'With this knowledge, and without asking a question, the defendant underwrote; and by so doing he took the knowledge of the state of the place upon himself,' etc.,"—citing 1 Marsh. Ins. 481, 482; Carter v. Boehm, 3 Burrows, 1905. And a distinction is made between cases of fire insurance and of marine insurance, because, in the case of fire insurance, the subject insured is usually situated on land, and nearer, so as to be examined more easily by the company or its agents, and the circumstances connected with it are more uniform, and better known to all. To sustain this is cited Jolly's Adm'rs v. Society, 1 Har. & G. 295; Burritt v. Insurance Co., 5 Hill, 192. The same doctrine was announced in Washington Mills Emery Manuf'g Co. v. Weymouth & Braintree Mut. Fire Ins. Co., 135 Mass. 503, where the court, in the course of its argument, said: "The plaintiff made no misrepresentations and no concealment as to its title. The policy is upon the buildings. The defendant saw fit to issue this policy without any specific inquiries of the plaintiff as to the title to the land, and without any representations by the plaintiff upon this point. It was its own carelessness, and it cannot avoid the policy without proving intentional misrepresentation or concealment on the part of the plaintiff. An innocent failure to communicate facts about which the plaintiff was not asked will not have this effect,"—citing many prior Massachusetts cases. A great many other cases might be cited to sustain this doctrine. It is true that the cases are not entirely uniform on this proposition, but we think the great weight of authority and the better reasoning sustains the appellant's contention.

So far as the question of notice of proof was concerned, the testimony was overwhelming that the company had disclaimed responsibility for the loss. Under such circumstances, no proof was necessary. The judgment will be reversed, with instructions to overrule the motion for a nonsuit.

BENNETT v. UNION CENTRAL LIFE INS. CO.

203 Ill. 439, 67 N. E. 971.

The policy and the premium notes provided that if the premium note was not paid on or before the date on which it became due, the insurance policy would lapse. The note was not paid at maturity. The company accepted an order on an attorney holding a judgment in favor of insured. *Held* the company as estopped to declare a forfeiture.

MUDD v.. GERMAN INSURANCE CO. OF FREEPORT, ILL.

22 Ky. 308, 56 S. W. 977.

The policy and note provided that the insurance should be suspended in the event of nonpayment of the note at maturity. The general agent of the company told the insured before the note was due, that a failure to pay the note when due would not prejudice him. *Held* a waiver of the provisions of the policy.

AETNA LIFE INS. CO. v. HARTLEY.

24 Ky. Law Rep. 57, 68 S. W. 1081.

The policy provided that if the premium was not paid at maturity, the insurance would lapse. The agent who solicited the insurance and delivered the policy told the insured, that a prompt payment was not necessary, that an extension of time of 60 days would be granted. Insured died fifteen days after the premium fell due. The court instructed the jury, in substance, that if they found as a fact that the insured believed and had reasonable grounds for believing that prompt payment was not necessary, and that the company would accept

the premium within a reasonable time and the jury further believed that the insured would have so paid had he lived their verdict should be for the plaintiff. *Held* the instruction correctly stated the law.

MONTGOMERY v. LEBANON TOWN MUT. FIRE INS. COMPANY.

80 Mo. App. 500.

In the absence of a stipulation designating a particular officer or agent who may waive an authorized waiver in reference to other insurance; *held* that the agent who solicited the insurance could bind the company in making such a waiver.

VIRGINIA FIRE & MARINE INS. CO. RICHMOND MICA CO.

102 Va. 429, 46 S. E. 463.

Insured had entered into a contract to sell the insured premises and had given possession to the purchaser. The insured made application to the agent of the company who had represented it in prior dealings with the insured for a renewal of a policy on the premises, he informed the agent of the status of title to the property, the agent informed him that it was not necessary to make any change in the policy on account of the contract to sell. Insured then paid the premium and accepted the policy in the same form as of the preceding year, the policy contained a stipulation that if it should appear that the interest of the insured in the premises was other than unconditional owner, the policy would be void. The policy also contained a stipulation that only certain officers should have power to wave the terms of the contract. *Held* the act of the agent prior to the issuing of policy estopped the company from declaring a forfeiture.

THOMPSON v. TRADERS INSURANCE CO.

The policy contained among other provisions a stipulation that it would be void if there should be other insurance on the property during the life of the policy, unless a waiver thereof was endorsed in writing on the policy, it further provided that no agent except the secretary should have authority to waive any provisions of the policy. The general agent residing where the property was located had authority from the company to grant permits for other insurance at his discretion. Without obtaining a permit the insured obtained other insurance. He notified the general agent, no permit was granted, the general agent made no objection to the other insurance, no action was taken to lapse the policy. *Held* the stipulation as to other insurance was waived.

CHAPTER XIII.

INSOLVENCY.

DOANE v. MILVILLE MUT. MARINE & FIRE INS. CO.

Court of Chancery of New Jersey. December 28, 1887.
43 N. J. Eq. 522.

Bird, V. C. The defendant company is an insolvent corporation. On the twenty-first day of September, 1885, a bill was filed setting forth the inability of the company to pay its debts. An order to show cause why a receiver should not be appointed, together with an order restraining the company from performing any duties whatsoever devolving upon it, was issued. Upon the return of the order, a receiver was appointed and an injunction awarded; soon after, a reference to ascertain the true condition of the company, the nature and extent of its liabilities, and to report the extent of its obligations, by way of marine losses, and also by way of losses by fire. The master having made his report, exceptions thereto have been presented. One important exception is in these words: "That the said master has certified that the losses that occurred under the mutual marine policies can only be collected from the assets of the mutual marine; that the amount of the different parties for losses that occurred under mutual fire policies can only be collected from the assets of the mutual fire. Whereas he ought to have certified that losses that occurred under mutual marine policies can be collected from the assets of the mutual marine and mutual fire, and that the amounts due the parties for losses that occurred under mutual fire policies can be collected from the assets of the mutual fire and mutual marine." This presents the judgment of the master, as it appears by his report, and the objections thereto. The question raised is serious

enough. Let us look at it. In so doing we must consider the charter, the by-laws, and the nature of the company, and the conduct, both of it and of its members, for a long period of its existence.

Its charter was obtained in the year 1859. Pamph. Laws 1859, p. 144. By this it was provided that the said corporation was incorporated "for the purpose of insuring their respective vessels, buildings, household furniture, merchandise, and other property against loss or damage by sea or fire." They were authorized to pass by-laws for the purpose of carrying into effect the object had in view by the charter. Section 8 of their by-laws provided that the company should keep the marine and fire accounts separate, and declared that the companies should be assessed to pay losses in their respective departments, and the expenses of the whole business should be charged to the different departments, fire and marine, as equitably as possible. It seems that, during a very long period, if not during all their existence, they endeavored to preserve a distinction between the marine and fire insurance. The proof shows that, at the very outset, circulars were issued, making known this distinction, which circulars were distributed by their agents, containing this language: "Both fire and marine insurance effected; but no fire notes can be assessed for a marine loss, nor a marine note for a fire loss." In addition to this by-law and this circular, it appears that the agents of the company faithfully represented the resolution of the company to everyone who became members thereof, so that marine policy-holders understood that they were independent of the fire policy-holders, and that the fire policy-holders understood that they were independent of the marine policy-holders. It is also in evidence that for a long period of time, if not during the entire existence of the company, the marine branch was much more profitable than the fire branch of the company; so much so, that while there was little or nothing in the treasury to the credit of the fire, there was nearly $40,000 to the credit of the marine; and it also appears that, at times, the former became indebted to the latter by the use of a portion of the money due to the latter, in order that the fire department of the company might be maintained.

The exceptants regard this attempt upon the part of the com-

pany to carry on two separate branches of business, under their charter, as void,—*ultra vires;* hence, as I have said, the question is a serious one. The view, however, which I take of it, relieves me from determining, at this stage of the transaction, whether or not it was the intention of the legislature to permit the company to carry on two separate and distinct branches of business. They had the power to insure against risks by sea, and also the power to insure against risks by fire. Whether, by mutual arrangement and agreement, they could fulfill the object of their mission and keep within the law by only applying the proofs of the marine department to that department alone, and of the fire to the fire department alone, I am not prepared to decide. But there is another view to be presented. I am clear that a corporation of this character may be estopped, by its resolutions and by its acts, as well as individuals. The corporation at its inception declared that they would carry on the two departments separately, making no other connection between the two than that the expenses of the institution should be as equitably borne by each as possible. This intention was immediately made known by their by-laws and by their circulars and by their agents. It cannot, therefore, be said that any individual was misled by supposing that the entire premium notes or assets of the company, whatever they might be, would be subject to the payment of his claims against the company. With his eyes opened, with this important fact before him, he voluntarily became a member of this association. He thus obliged himself to accept these terms, and also obliged himself, to every other member of the company, that he would see to it that these terms were carried out. It was a mutual agreement between all concerned. This simple statement of facts seems to warrant the conclusion that, after the existence of this company for over 20 years, during which entire period all persons becoming interested acknowledged the force of the by-law, consented thereto, and also to the circular and the action of the agents. It seems to be impossible that the court could declare the action of the company void, without, at the same time, doing great injustice. Each member had a right to take the other at his word; each had a right to confide in the integrity of the company, and in its power to proceed upon the

basis indicated; and if each policy-holder made his investment and secured a benefit upon the principle involved, how can the court now say to him, "You did an unlawful thing, and the profits or benefits which you expected to derive therefrom you are not entitled to?" Or how can the court say to another class that "the action of the company being contrary to law, you are not only entitled to no profits or benefits, but you are under obligations to do that which you did not contract to do," —which must, in this case, upon the one hand or the other, inevitably be the result, if the doctrine of estoppel be not applied. For there would be no complaint if it were not the fact that one of those branches has fallen far short of profit, while the other, for the time being at least, was very profitable. Therefore let me again ask, how can the court say to those who are in the branch of the company which has been profitable, that "you are not only not entitled to any credit because of the profits which have been made to your department, according to the contract, but you must pay, to the amount of your premium note, that proportion of indebtedness which the other branch of the company has incurred?" In what department of the law has any such proposition found a foothold? In what department of equity has it ever been declared that where one individual solemnly contracts with another for the purpose of a particular thing, and they mutually advance money to its accomplishment, and irretrievably changes his legal relations, that he is not equally bound? It cannot be said that there is any fraud. There is no deception. It is admitted that every holder of a policy had the fullest information. Therefore it is most clear that the doctrine of estoppel must apply. If not in such case, it should be obliterated from our books as a mockery. Had this question arisen upon the first institution of the company, or its first publication of the by-law, there would have been far less difficulty in determining the rights of policy-holders. It may be that, under such circumstances, a court would feel itself obliged to say that the charter did not contemplate the separation of the two branches of business. Doubtless every one will admit that the argument presented by the exceptants to the effect that a single charter cannot be intended to create two corporations has great force.

It appearing, therefore, that this exception should not prevail, the next important inquiry is whether the exception presented by the Woods is well taken or not. They were members of that company. Before the company was declared insolvent, they presented their policies, and, upon the payment of 2½ per cent., secured a release from all liability by the cancellation of their policies. The master reported that, under the circumstances, this release or cancellation is not effectual, but that they are still liable for their full proportionate share of the losses and expenses incurred during the life of their policies, and which actually existed at the time of cancellation. This has been excepted to as erroneous; the insistment being that, as the company had the right to discharge them and cancel their policies, and as they accepted the terms which the company was willing to make, and paid the 2½ per cent. imposed, they are free from all further liability. In this respect I think the master should be sustained. It may not have been thought, at the time of the cancellation of these policies, that the company was in serious financial embarrassment. But it would seem that of this fact there can be no doubt. There can be no doubt that insolvency was then staring the officers in the face. If this be so, what possible right had they to transfer a large proportion of the assets of the company without an adequate consideration? I do not think it can be contended for a moment that such an act was justifiable; if several thousand dollars worth of assets could have been thus surrendered, all of the assets of the company could have been so surrendered likewise. A matter so plain, it seems to me, need only to be stated in order to show the substantial rights of the creditors of the company to their claim against the persons whose policies were thus canceled. I conclude, therefore, that they must account and answer for the full amount for which they were liable under the charter and by-laws at the time of the cancellation of their policies, giving them credit for the amount already paid. Insurance Co. v Kinnier's Adm'x, 28 Grat. 88; Sands v. Hill, 42 Barb. 651; Sterling v. Insurance Co., 32 Pa. St. 75; Com. v. Insurance Co., 112 Mass. 116; Cumings v. Sawyer, 117 Mass. 30; Smith v. Insurance Co., 3 Hill, 508; Insurance Co. v. Boeckler, 19 Mo. 135; Hyde v. Lynde, 4 N.

Y. 387; Nathan v. Whitlock, 9 Paige, 151; Burke v. Smith, 16 Wall. 395; Insurance Co. v. Stewart, 10 Va. 387; Insurance Co. v. Van Winkle, 12 N. J. Eq. 333; Miller v. Fire Ass'n, 42 N. J. Eq. 459, 7 Atl. Rep. 895. The foregoing, I think, presents the discussion so far as it has been opened before me with respect to the assets of the company, and the liability of the different members thereof.

The next question is as to the distribution of the assets between judgment and general creditors. The master has reported that the assets of the company are all equitable assets, and being such, must be distributed equitably; and as a consequence of that fact, judgment creditors have no preference. The eightieth section of the act respecting corporations provides "that in the payment of creditors, and in the distribution of the funds of any such company, the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors when the judgment has not been by confession for the purpose of preferring creditors." I do not think words can be so placed as to make language any plainer. The language is not that the creditors should be paid equally, if the assets of the company are equitable assets; nor that the judgment creditors shall have preference out of the legal assets of the company. Nothing is said upon the question, one way or the other. It simply declares how they shall be paid,—that "in payment of the creditors and in distribution of the funds of any such company." Manifestly, the officer who is winding up such company has nothing to deal with, under the statute, upon this point, but funds,—the proceeds of sales of real and personal estate, or the proceeds of any other assets converted into funds. He is supposed to have converted everything into money,—into funds; and these funds he is directed by the statute to make distribution of proportionately among the creditors, except to mortgage and judgment creditors. The exception on this ground is well taken.

Although the exceptions to the master's report have not raised the question directly, and although the argument of counsel did not present it specifically, yet the conclusion which I have expressed, lastly, and the facts presented in the testi-

mony and in the master's report, and fully suggested by the argument of counsel, render it necessary that it should be determined at what point a creditor shall cease to acquire any benefit from his diligence in obtaining a judgment. It cannot be that a judgment recovered at any time before distribution of the funds, comes within the statute, and is to be paid in full, in preference to general creditors. A limit must, therefore, have been intended by the legislature. At what point of time is that limit? Is it at the time of the appointment of the receiver, or of the issuing of the injunction, or of an order to show cause why an injunction should not issue and a receiver be appointed, with a restraining clause, forbidding the company from collecting any moneys or paying or discharging any debts, or transacting any business whatsoever, or the filing of the bill? It seems to me that the true spirit and intent of the act is to limit the period at which a judgment may be recovered, and the creditor secure the benefit of the priority contemplated by the statute, to whenever the court, according to the directions of the statute, wholly or partially takes control of the company, and of its assets, either by injunction or other preliminary order, thereby depriving the company of all power to act in the premises, except under the directions and by the consent of the court itself. When the court takes either of these steps, the hands of all parties, the company and its agents and creditors, including judgment and execution creditors, are all alike stayed. No one of them can proceed with any effect towards the payment of a debt or enforcing a judgment by execution or otherwise. It is true, the creditor may obtain his judgment, and thereby certify his claim; but he cannot seize upon the assets of the company, nor can the company discharge the judgment by paying. Therefore, at and after the juncture of filing the bill and issuing a restraining order or injunction, it would seem that no proceedings could be made effectual by a suitor against the company or its assets; both being in the custody of the law. This very wise and salutary principle is universally recognized.

In this same connection, another question was presented by the concurrence of events; a judgment having been entered upon the day that the bill of complaint was filed and the re-

straining order issued. On which side of the line does the judgment creditor, in such case, stand? If the court undertakes to classify him with judgment creditors, upon what principle shall it be done? I can discover no principle which secures to him any priority over general creditors. As the law in such cases knows no parts of days, a judgment entered on the day of obtaining the restraining order would be excluded. As already intimated, the court by its order forbids the defendant company from paying. This being lawful, I do not see by what method the judgment creditor could compel payment by execution; and, since he cannot do this, I cannot see how he could acquire a preference. In other words, when the court steps in and takes possession, all opportunity for any one obtaining an advantage by his diligence ceases. Johnson v. Pennington, 15 N. J. Law, 188; Thomas v. Desanges, 2 Barn. & Ald. 586; Rex v. Warwick, 1 El. & Bl. 816. As the case stands this principle governs. A loss accrued after the appointment of a receiver. The policy-holder insists that he is entitled to share in the distribution of the assets of the company. Against his claim the master has reported; to this there is an exception. So far as this question has been considered by the courts, the master is right.

When a company of this character becomes insolvent, and passes into the hands of a receiver, it ceases to be for all purposes except that declared by the statute,—the winding up of its affairs according to the directions of the statute permitting its existence, under which it was created, and subject to which it necessarily always is. Every person becoming a member of such company is subjected to all the provisions, conditions, or limitations of the statute. He has no reason to complain, because they are part of the bargain. Notwithstanding the apparent hardship in which such policy-holder finds himself, it is less troublesome to the cautious and less obnoxious to reason than at first appears. He had it in his power to provide against the contingency which involved him in the loss he sustained, and which he now seeks to recover of this company. He could have secured other insurance, and, by the insolvency of this company, was warned so to do if he expected relief from such disaster. Mayor v. Attorney Gen., 32 N. J. Eq.

815; Dean's Appeal, 98 Pa. St. 101; Com. v. Insurance Co., 119 Mass. 45.

I will advise a decree in accordance with these views. The prevailing party is entitled to costs.

LEHIGH VALLEY FIRE INS. CO. v. DRYFOOS et al.

Supreme Court of Pennsylvania, April 25, 1887. 9 Alt. 262.

Insolvency. Assessments.

Debt, by the Lehigh Valley Fire Insurance Company, to the use of W. J. Romig, assignee for the benefit of creditors, against Henry Dryfoos, W. A. M. Grier, and John C. Youngman, trading as Dryfoos, Grier & Youngman, to recover upon two premium notes. This case was tried twice. A verdict upon the first trial having been rendered for plaintiff, the court granted a new trial; the following opinion, by Rice, P. J., stating the facts:

"On February 2, 1877, the plaintiff company made an assignment for the benefit of creditors. On March 28th following, the directors met and passed the resolution of assessment upon which this action was based. The resolution is important, and we quote it at length: 'Whereas, in consequence of losses by fire and other liabilities, amounting in the aggregate to about $50,000, the L. V. Fire Ins. Co. have made an assignment for the benefit of its creditors, and in order that the affairs of the company may be settled as speedily as possible, therefore resolved that an assessment on the members of the company be laid to the amount of the premium notes given by them, less all previous assessments, to pay on the losses by fire and other expenses of the company, and that the same be collected by the assignees in installments until the said losses and expenses shall have been adjusted and paid.' On the trial the plaintiff recovered. The defendants' first proposition in support of the present rule is thus stated: 'The assessment, as shown by plaintiff's testimony, was unauthorized, illegal, ex-

cessive, and void, and the court should have so instructed the jury in accordance with defendant's first, second, and third points.'

"We are of opinion that the resolution above quoted contained all the essential elements of an assessment, and was valid as such, provided the facts, as they existed at the time it was made, justified it. It implies an ascertainment by the directors of the losses and liabilities which the assessment was intended to cover, and contains a statement of the amount with reasonable certainty. It also declares the rate which each member was to pay. What remained was a mere matter of calculation from known data. We think it was not necessary to specify the losses in detail, inasmuch as it covered all the unpaid losses and liabilities of the company; and it certainly was not necessary to set forth the name and amount of assessment of each policy-holder, or member whose policy had expired, but whose premium note was still liable to assessment for the losses which had accrued. Lycoming Fire Insurance Co. v. Rought, 97 Pa. St. 415; Sands v. Sanders, 26 N. Y. 244, and 28 N. Y. 416.

"But we were asked to give binding instructions that the assessment was not justified by the facts which were shown by the evidence to have existed at the time it was made. In deciding whether the court erred in refusing instructions to this effect, we recognize the principle that that view of the evidence must be taken which is most favorable to the plaintiffs. In other words, if any fair view of the evidence authorized the submission of the question to the jury, their verdict should not be disturbed, even though the court might possibly have reached a different conclusion from the same evidence.

"The first fact which may be taken as established is that the company was insolvent. This in itself justified an assessment of some amount. Schimpf v. Lehigh Val. Fire Ins. Co., 86 Pa. St. 373. But there are many different phases of insolvency, and it does not necessarily and conclusively follow that the directors of a mutual insurance company would be thereby justified in making an assessment of the full amount of all the premium notes in force, merely because of the inability of the company to discharge all of its liabilities at once.

The delay incident to the collection of a sufficient sum from the members to meet the losses and liabilities which had accrued might be, and undoubtedly was in this case, ample justification for ceasing business, and making an assignment for the benefit of creditors, but was not a conclusive justification for an assessment of one hundred per centum on all the premium notes in force. The liability of a member of a mutual insurance company on his premium note left as a deposit, as the basis of an assessment, should occasion arise, is not an absolute liability to pay the whole amount of his note, but it is conditional, and depends upon the contingency of the happening of losses and expenses to which he shall be liable to contribute, which have been duly ascertained by the directors, and which made necessary a resort to an assessment thereon. May, Ins. No. 557. This liability is not changed by the facts which may dictate or require an assignment for the benefit of creditors. Notwithstanding the assignment, the functions of the directors, so far as assessments are concerned, remained the same, and their discretion in that matter remained to be exercised according to the same rule of law as before. 'That instrument passed only the assets of the corporation, not its franchises.' Schimpf v. Lehigh Val. Fire Ins. Co. 86 Pa. St. 373.

"Coming now to the evidence as to the condition of the company, we think it is safe to say that there was evidence proper to be submitted to the jury of losses which had occurred in the years 1874-5-6-7 (during most of which time the defendants' policies were in force), amounting, with interest, to between $40,000 and $50,000. There was also evidence that the amount of premium notes liable to assessment was $174,000. Of this amount $79,391.27 were notes which belonged to policies still in force on December 1, 1876, but how long they had been in force does not appear. The residue belonged to policies which had expired before that time; but when they had expired, whether before or after the defendants' policies were issued, does not appear by any express evidence. But inasmuch as they were included in Mr. Datesman's statement to the board, and as that statement was admitted in evidence for the purpose of showing upon what basis the asess-

ment was made, they cannot safely be disregarded. We have then, adopting Mr. Datesman's statement, the following figures, showing approximately the general condition of the company's affairs when the assessment was made:

December 1, 1876. Premium notes in force belonging to unexpired policies,	$ 79,391.27
Premium notes liable to assessment, including the above	174,000.00
Unpaid losses for 1874	$12,408.41
Unpaid losses for 1875	22,437.06
Unpaid losses for 1876	12,901.63
Total	$47,747.10

"Did this state of affairs authorize the directors to make an assessment of the full amount of all the premium notes in force? After a more careful examination of the evidence and the authorities than we could make on the trial, we are led to the conclusion that prima facie it did not. 'By the terms of the charter and the premium note, the assured submits himself to the acts of the directors, as the common representatives of all the members. He and they are all bound by the assessments made by them, unless he can show fraud or gross mistake. This is a rule of law he has no right to complain of.' Hummel's Appeal, 78 Pa. St. 320. It would seem, therefore, that, unless there is something on the face of the assessment to show its unreasonableness, the prima facie presumption is in its favor. Any other rule would be inconsistent with the nature of the contract, and would subject the company in its practical workings to manifold inconveniences. Nevertheless the presumption in favor of the action of the directors is not conclusive. 'Assessments must be limited to the objects declared in the charter and by-laws. The managers may exercise a reasonable discretion in fixing the amount to be raised, for the charter must be construed in reference to its practical working. The actual sum required can be ascertained; but as expense must be incurred in the collection, and loss be sus-

tained in consequence of insolvency of members, proper allowances may be made for failures likely to result from these and other causes; and if the allowances are reasonable in amount, and consistent with good faith on the part of the directors, they will not vitiate the assessment. But if these reasonable limits are disregarded and transcended, purposely or by culpable carelessness, the assessment is illegal and void. Jones v. Sisson, 6 Gray, 288; People's E. M. Fire Ins. Co. v. Babbitt, 7 Allen, 235. In the latter case, and in Traders' M. Fire Ins. Co. v. Stone, 9 Allen, 483, it was held that an addition to the debts and reasonable allowance of one hundred per centum was so unreasonable as to make the assessment void. In these cases there was no evidence tending to justify so large an addition or excess; and, in the absence of such evidence, so large an excess, in most cases, would be prima facie proof of fraud or gross negligence.' Rosenberger v. Washington Fire Ins. Co., 87 Pa. St. 207. Taking the facts as they were presented to the board by Mr. Datesman's statement, we think the discrepancy between the total losses, and the whole amount of premium notes which seemed to be liable to assessment for at least a portion of the losses, is too great to be considered a reasonable allowance for expenses and uncollectible claims, without some express evidence to warrant that inference.

"Further, if an assessment of the full amount of all the premium notes in force was so grossly excessive as to be vitiated thereby, we do not think it was cured by the concluding direction to the assignee to collect the same 'in installments, until all the said losses and expenses shall have been adjusted and paid.' If the assessment of the full amount of all the notes was warranted, we admit that this direction to the assignee would not invalidate it. But, if an assessment of that amount was not justified, the directors might as well have omitted to make an assessment at all, and simply directed the assignee to exercise his discretion, and to collect such proportions of the premium notes as might be found necessary. They could not so delegate their functions, and, if the assessment depended for its validity solely on that direction to the assignee, we think it would be void for uncertainty.

"The next question is whether the assessment was valid

as against these defendants. There seems to be good sense in, and authority for, the proposition that, if the ascertained losses accruing during the time that the defendants' policies were in force were so large as to justify an assessment of the full amount of their notes, they cannot object to the validity of the assessment merely because other notes were included therein which would not be liable to contribute for any or all of those losses. Sands v. Sanders, 26 N. Y. 244, and 28 N. Y. 416; Long Pond Mut. F. Ins. Co. v. Houghton, 6 Gray, 77. To illustrate, we quote from the opinion in the last-cited case: 'The case of the other defendant, Hunt, stands in a different position in this respect. Having become a member before the loss of eighth August, 1850, he might be properly assessed for all the losses and expenses after that date, and before the assessment was made. It is no objection open to him to the validity of the assessment that individuals who had more recently become members were also assessed for these losses, for some of which they were not liable. He is not injured thereby, as his assessment is not increased but diminished. He is therefore liable for the assessment.' Applying this principle to the case in hand, it follows that, while the general assessment was *prima facie* invalid on the ground of excessiveness, this it was competent for the plaintiffs to show, if they could, that it was not excessive so far as these defendants were concerned, and hence was not void as to them. But, being *prima facie* invalid on the facts already stated, the burden was cast on the plaintiffs of showing that it was valid as against the defendants. And here we think there is a failure of proof. The defendants became members of the company in the early part of 1874; their first policy being dated February 4th, and their second, June 1st. The assessment was made for losses occurring in the years 1874, 1875, 1876 and the early part of 1877. In order, therefore, to ascertain whether the defendants would be liable to an assessment of the full amount of their notes to cover these losses, it is essential to know, at least approximately—First, the date and amount of each loss; second, the whole amount of premium notes in force on that date, and liable to assessment for that particular loss. With these data the percentage of each loss to be borne by the defendants would

be a mere matter of calculation, and the sum of the percentages would constitute the ratio for ascertaining the amount which the defendants ought to contribute for the total losses. To this amount the directors are authorized to add reasonable allowances for expenses of collection, insolvency of members, and other proper matters. Ae we have already stated, the evidence shows the losses, and in many, if not most, of the cases, the particular dates and amounts, with reasonable certainty. It also shows the total amount of premium notes in force, and the amount of premium notes belonging to policies in force, on December 1, 1876. But it fails to show the total amount of premium notes in force at the time of each loss, and liable to assessment for the same. Hence the jury had not the data before them for ascertaining the particular fact which, in view of the prima facie effect of the evidence as to the total amount of losses, and the total amount of premium notes apparently assessed to pay the same, was essential to the plaintiff's recovery. We have not overlooked the testimony of Mr. Stackhouse, but it is to be observed, with regard to his testimony that his calculation and statement were not the acts of the directors, or of their officer or clerk. They were made by Mr. Stackhouse, after the assignment, as clerk for the assignee, and did not constitute part of the directors' action in making the assessment. Therefore they cannot be allowed to have any conclusive or even *prima facie* effect as the acts of the defendants' agents. In so far as his calculation and statement were based on data in evidence we think they were competent, but not beyond that. Hence they were not evidence per se of the premium notes outstanding and liable to assessment at the respective dates of the several losses; and, not finding any other evidence in the record of that fact, we are led to the conclusion that the defendants' third point should have been affirmed.

"This conclusion renders any discussion of the other rulings of the court complained of unnecessary. As these questions are likely to arise on the second trial of the case, it is advisable to express no opinion upon them in advance.

"The reason based on the alleged misconduct of counsel in the argument to the jury is not sustained. It is undoubtedly

improper—and this the counsel concedes frankly—to allude to evidence which has been offered and rejected. But we are fully satisfied that any injurious effect which might have resulted from the transgression of this rule by the plaintiff's counsel was totally destroyed by the remarks which the defendant's counsel immediately made to the opposing counsel and to the jury.

"The reason based on the alleged misconduct of one of the jurors is also overruled. If the juror said to his fellow-jurors what, according to the testimony of the tipstaff, he admitted he said, his conduct deserves condemnation. But we do not think the evidence as to his declarations, after the verdict had been agreed upon, is competent. Upon the policy of the law, evidence of the fact could not be received directly from his lips; a fortiori, second hand proof, consisting of his unsworn admissions of the fact, cannot be received to impeach the verdict. Building Ass'n v. Mitchell, 2 Klp. 343, and cases cited."

Upon the last trial, the court charged the jury as follows: "This is an action brought by W. J. Romig, the assignee of the Lehigh Valley Fire Insurance Company against the firm of Youngman, Grier & Dryfoos, to recover assessments on certain policies of insurance which had been issued by the Lehigh Valley Fire Insurance Company to the defendants. The case was tried once before, and all of the testimony taken was reduced to writing. A ponit was submitted at that trial to the effect that, on the evidence as then presented, the plaintiff was not entitled to recover. After a consideration of the case upon a rule for a new trial, we came to the conclusion that the point was well taken, and, as there is no other testimony in the cause, the counsel submit it to the jury upon the evidence adduced upon the former trial, to be ruled upon by us upon that testimony. This is done for the purpose of saving time, and also, as we understand it, for the purpose of obtaining a speedy review of the conclusion of the court. We therefore instruct you, pursuant to the third point submitted upon the former trial, that your verdict should be for the defendant."

Verdict accordingly for defendants, and judgment thereon; whereupon plaintiff took this writ.

F. W. Wheaton and E. P. & J. V. Darling, for plaintiff in error.

Assessments are limited by the charter and by-laws and are left to the discretion of the managers. Rosenberger v. Washington Fire Ins. Co., 87 Pa. St. 207; Hummel's Appeal, 78 Pa. St. 320; Sands v. Sanders, 26 N. Y. 244; 28 N. Y. 416; Long Point Mut. Ins. Co. v. Houghton, 6 Gray, 77.

Allan H. Dickson and H. W. Palmer, for defendants in error.

The liability on the premium notes is not absolute, but is conditional on the happening of losses. Hays v. Lycoming Ins. Co., 99 Pa. St. 626. An excessive assessment is invalid. People's Mut. Ins. Co. v. Babbitt, 7 Allen, 235; Traders' Mut. Ins. Co. v. Stone, 9 Allen, 483; Jones v. Sisson, 6 Gray, 288; Rosenberger v. Washington Mut. Ins. Co., 87 Pa. St. 212; Great Falls Mut. Ins. Co. v. Harvey, 45 N. H. 292.

Per Curiam. It is true that assessments considerably in excess of the amount actually required for the payment of losses have frequently been sustained. If not much in excess, the presumption is that the gross sum was properly laid in view of the costs attending the collection of numerous small amounts, and the probable insolvency of the makers of some of the notes. In such cases the burden of showing the assessment to be excessive is on the person alleging it to be so. The assessment, however, may be so much in excess of the amount required for the payment of losses as to change the burden of proof, and compel the company to prove that it is reasonably proper in considering all the circumstances. That is just this case, and, the company having wholly failed to give any evidence showing the sum to be reasonably proper, there was no error in giving binding instructions to the jury to find for the defendant. The reasons for this conclusion are well stated in the able opinion of the learned judge in discharging the rule for a new trial. Judgment affirmed.

McDONALD et al. v. ALABAMA GOLD LIFE INS. CO.

Supreme Court of Alabama. 1888. 85 Alabama 401.

Insolvency. Personal Liability of Stockholders.

Somerville, J. The bill is filed, by certain policy holders against the defendant corporation, which is an insolvent life insurance company, and against co-defendant stockholders owning shares in the company, on October 8, 1886, the date of its dissolution, as manifested by the making, on that day, of a general assignment for the benefit of creditors. The complainants claim to be creditors of the company *in praesenti*, and seek to subject the stockholders to a personal liability in sums respectively equal to the amount of their stock, and additional to such stock, under the provisions of the constitution and laws of Alabama, which were of force at the time the company was organized, in the year 1868. It is claimed that this personal or individual liability arises severally under the constitution of 1868 and under the Code of 1867. The provisions of that constitution relied on as applicable are sections 2 and 3 of article 13, which read as follows: "Sec. 2. Dues from corporations shall be secured by such individual liabilities of the corporators or other means as may be prescribed by law. Sec. 3. Each stockholder in any corporation shall be liable to the amount of his stock held or owned by him." Section 1760 of the Revised Code of 1867, identical in language with section 1478 of the Code of 1852, is in the following words: Section 1760. "The stockholders of any such corporation are liable for all debts due by it at the time of its dissolution, to the extent of their stock." This section is made applicable to life insurance companies, by the act approved August 6, 1868 (Acts 1868, p. 16), which purports to amend section 1755 of the Code of 1867, provided such amendatory act be sustained as constitutional. The errors and cross-errors assigned are based on the rulings of the chancellor on the demurrers to the bill, all of which were overruled except those making objection to the paid-up policy of Mrs. McDonnell as one not imposing any personal liability on the

stockholders. This paid-up policy was issued after December 5, 1875, when the present constitution went into effect, with its accompanying provision that "in no case shall any stockholder be individually liable otherwise than for the unpaid stock owned by him or her." Const. 1875, art. 14, § 8; Code 1876, § 2023. Her original policy was, however, issued on February 23, 1870, while the constitution of 1868 and section 1760 of the Code of 1867 were in force. We proceed to consider *seriatim* the various objections to the equity of the bill as suggested in the demurrers and presented on argument.

1. It is first urged by counsel that neither the phrase "shall be liable to the amount of stock held or owned by him," as used in the constitution of 1868, nor that used in the Code of 1867 (section 1760), liable "to the extent of their stock," can be properly construed to mean liable for such amount additional to, or over and above, their stock; but that these phrases mean nothing more than that stockholders of corporations shall be personally liable to creditors for unpaid subscriptions of stock. It is enough to say that this contention is settled against the cross-appellants by the past decisions of this court, which hold that these laws were intentionally framed for the express purpose of imposing a personal or individual liability on corporate stockholders, not only to the extent of their unpaid stock, but for an additional sum equal to the amount of such stock, enforceable by a bill in equity for the equal benefit of the creditors on the dissolution of the corporation. Smith v. Huckabee, 53 Ala. 191; Spence v. Shapard, 57 Ala. 598; Association v. Insurance Co, 70 Ala. 120. Laws having in view a like purpose, of securing the public against extravagant speculations and incautious enterprises on the part of bodies corporate, have long prevailed in this state, and in many other states of the union. The language of these foreign statutes is, in many cases, quite similar to our own, and a like construction has been placed upon them by the highest courts of the several states enacting them. Briggs v. Penniman, 8 Cow. 387; Hawthorne v. Calef, 2 Wall. 10; Cook, Stocks, § 215, note 2; Terry v. Tubman, 92 U. S. 156.

2. It is expressly provided in some of these statutes that the personal liabilities of stockholders for this additional

amount shall arise only after a recovery by the creditor of a judgment against the corporation, and an exhaustion of his legal remedy by a return of no property found. The remedy, in other words, is there conferred only on judgment creditors after exhausting the corporate assets. It is manifest that under neither the provisions of the constitution nor those of the statute under consideration, is any such limitation established; and, not being so restricted, the remedy must be construed as being conferred on all creditors, including those who have no lien, or whose claims are evidenced by simple contract. The assignment of demurrer based on this ground was properly overruled. Spence v. Shapard, 57 Ala. 598; Association v. Insurance Co., 70 Ala. 120.

3. It is further contended that the claims of policy-holders in life, like those of the complainants, do not come within the class of demands intended to be secured by this additional liability; that they are not "dues" from the corporation, within the meaning of the constitution of 1868, nor "debts due" by it, within the intention of the statute, and that for this reason the bill is wanting in equity. Laws of this peculiar kind have been held by some courts to be remedial, and therefore to be liberally construed. By others they have been construed strictly as in derogation of the common law. The true principle sustained by the sounder reason, in our judgment, is that they should be construed neither liberally nor strictly, but reasonably, so as to carry out the clear purpose and policy for which they are enacted. Thomp. Liab. stockh. § 53; Freeland v. McCullough, 43 Amer. Dec. note, pp. 696, 697. It is accordingly the opinion of the court that the claims of the complainants, growing out of the insolvency of the defendant, and the repudiation of its duty to carry the policies by a discontinuance of its business, are debts due in *praesenti*, upon the dissolution of the corporation, and, as such, fall within the intention of the law. There is in this case a manifest and total breach of contract by the company in its failure to carry on the business of life insurance. This breach has resulted in damage to all persons holding policies for which an immediate action will lie. These damages, moreover, are liquidated, being capable of the most accurate and certain mathematical as-

certainment. The legal measure of such damages is the surrender or equitable value of the policy, calculated on the basis of the "American Tables of Mortality," which are now the orthodox standard throughout the United States and Canada, and of which judicial notice will be taken by the courts. The data of age, premiums paid, and the date of the policy being given, this value becomes certain and fixed, and, we repeat, the policy-holder becomes a creditor of the company with the right to sue for such value instanter, upon its dissolution. People v. Insurance Co., 78 N. Y. 114; Insurance Co. v. Statham, 93 U. S. 24; McCall v. Insurance Co., 9 W. Va. 237; Day v. Insurance Co., 45 Conn. 480; Gordon v. Tweedy, 74 Ala. 232. And the claim is none the less a "debt due," within the purpose and intent of the law, because it was, at the time the policy was taken out, payable on a future contingency. It was nevertheless *debitum in praesenti, solvendum in futuro;* having in its composition no element of tort. U. S. v. Bank, 6 Pet. 36; Fearn v. Ward, 65 Ala. 33; Cable v. McCune, 26 Mo. 371; Carver v. Manufacturing Co., 2 Story, 432.

4. The pivotal period fixed by the statute for the accrual of this personal liability is for those debts due at the time of the dissolution of the corporation. Code 1867, § 1760. That the defendant corporation was dissolved, within the meaning of this statute, by the assignment made by it for the benefit of creditors in October, 1886, and by its entire cessation of business, there can be no doubt. A practical and not a judicially adjudged dissolution is what the statute contemplates. This is evidenced by insolvency, and the turning of the corporate assets over to a trustee for distribution among creditors, followed by a complete abandonment of the business for which the company was organized. The authorities, both in this and other states, are so full on this point as to render any lengthy discussion of it unnecessary. Association v. Insurance Co., 70 Ala. 120; Slee v. Bloom, 19 Johns. 456; Briggs v. Penniman, 8 Cow. 387; Thomp. Liab. Stockh. § 267.

5. The claims in suit not having become due until the dissolution of the corporation on October 8, 1886, no right of action accrued thereon until that day against the stockholders of the company. The bill having been filed October 15, 1886,

only seven days thereafter, it is palpable that the suit is unaffected by the statute of limitations, either of six years or of any other period.

6. It is suggested that the defendant corporation, the Alabama Gold Life Insurance Company, was never legally organized, there being no law, general or special, which authorized the organization of life insurance companies in the year 1868. This contention is based on the idea that the act approved August 6, 1868, amendatory of section 1755 of the Revised Code of 1867, which adds life insurance companies to the list of corporations authorized to be formed under the general law, is void for repugnancy to section 2 of article 4 of the constitution of 1868, then in force, which provided that "no laws shall be revised or amended unless the new act contain the entire act revised, or the section or sections amended." The case of Bridge Co. v. Olmstead, 41 Ala. 1, is cited in support of this view. Whatever merit there may be in this contention, a sufficient answer to it is found in the fact that the defendants, who seek to raise this objection, are estopped from setting up the illegality or irregularity of their corporate organization. They are stockholders in the company, and have undertaken to organize and hold themselves out to the public as such, and as a lawful body corporate. They have obtained credit and issued policies on the faith of this representation, whereby they have solemnly affirmed the validity of the law, under which they organized, and consequently the legality of the organization. This was an admission of the constitutionality of the amendment now assailed as void, and this admission cannot be now retracted to the prejudice of those who have accepted policies upon the faith of its affirmed validity. To repeat in brief—all stockholders situated as are the defendants in this case, must be held estopped to deny constitutionality of the law under which they organized, and for 18 years uninterruptedly carried on their business. McCarthy v. Lavasche, 89 Ill. 270; Association v. Insurance Co., 70 Ala. 121.

7. It is further argued that the personal liability of stockholders, as imposed by the statute under the constitution of 1868, was given by law, and that it could be taken away by

law,—that is, by the repeal of the law giving it. This repeal was effected on December 5, 1875, when the constitution of 1875 went into effect, section 8 of article 14 of that instrument declaring that, "in no case shall any stockholder be liable otherwise than for the unpaid stock owned by him or her." Section 2023 of the Code of 1876, enacted to carry this clause into effect, from abundant caution provided, that while stockholders shall be individually liable to the creditors of corporations for unpaid stock, "no such stockholder shall be otherwise individually liable for any dues or debts, owing by such corporation, incurred or contracted after the 5th day of December, A. D. 1875." Code 1876, § 2023. The question arises, does this repeal retroact upon contracts of insurance made under the old law so as to destroy the individual liability of stockholders as to such contracts? We might dispose of this point without any discussion on the authority of Hawthorne v. Calef, 2 Wall. 10, where the precise question arose, and was expressly decided in the negative by the supreme court of the United States. That case was this: The charter of a corporation in the state of Maine, granted in the year 1836, provided that the property of the individual corporators should, under certain restrictions, be liable for the debts of the corporation "to the amount of their stock." A few months after the debt then in suit had been contracted by the corporation, the legislature of Maine passed a statute repealing this individual liability clause of the charter. It was argued there, as here, that the liability was created by statute, and could therefore be taken away by statute. This view was entirely repudiated by the court. It was held, on the contrary, that the liability was contractual, not purely statutory; that it arose by contract under the provisions of the law as contained in the company's charter. It was accordingly held to be protected as a contract by the clause of the federal constitution ordaining that "no state shall pass any law impairing the obligation of contracts." This is a federal question, and this decision, involving, as it does, a judicial construction of an important clause in the constitution of the United States, is conclusive on the state courts. State v. Agee, 83 Ala. 110, 3 South. Rep. 856. But, independently of this consideration, the conclusion attained in that case is every-

where supported by the great current of judicial authority. The doctrine accordingly is generally asserted that, where a statute imposes upon stockholders an individual liability for corporate debts, whether to a limited or unlimited extent, this liability enters into the contract of subscription by each stockholder, and forms a part of the security of the creditors of the corporation when the debts are contracted, as fully as if it had been incorporated in the contract, and had been signed by the several subscribers for, or transferees of, such stock. Corning v. McCullough, 49 Amer. Dec. note, pp. 308-310; Hodgson v. Cheever, 8 Mo. App. 321; Lowry v. Inman, 46 N. Y. 119; Association v. Insurance Co., 70 Ala. 120, supra; Edwards v. Williamson, Id. 145; Aultman's Appeal, 98 Pa. St. 505; Cook, stocks, § 118, p. 208. The only respectable authority holding the contrary doctrine which we find is Coffin v. Rich, 45 Me. 507, decided by the supreme court of Maine in the year 1858, which was six years prior to the promulgation of Hawthorne v. Calef, 2 Wall. 10, in 1864, where a similar decision of the Maine court was pronounced erroneous. The view thus contended for by the cross-appellants manifestly cannot be sustained. The rulings of the chancellor on the demurrer fully accord with the foregoing principles, and the cross-assignments of error made in this court by the respondents to the bill based on these rulings must all be overruled.

8. These principles strictly affect only those policies which were issued prior to December 5, 1875, the day when the repeal of the individual liability law was effected by the adoption of our present constitution, with its new provision on this subject. One of the policies sued on—that of Mrs. McDonnell—is a paid-up policy issued to her on February 22, 1882, after our present constitution went into effect. Her original policy, of which, the bill alleges, this was a mere continuation, had been issued on February 23, 1870, while the individual liability clause of the statute was in force. It is sought to distinguish the principles governing this contract from those governing original policies issued prior to the repeal of the old law. The chancellor, acting on this view, held that the paid-up policy of Mrs. McDonnell was a new contract, made under the influence of a new law, and that it must be governed by the pro-

visions of the constitution of 1875 and of the Code of 1876. He decides, in effect, that the paid-up policy creates a new debt, incurred or contracted after the 5th of December, 1875, within the meaning of section 2023 of the Code of 1876. It must be kept in mind that the first or original policy expressly provided for its surrender, and the issue of the second or paid-up policy, "for the value acquired" under the first, on certain conditions. Upon the payment of 14 annual premiums, the assured was entitled to a paid-up policy for the full amount of $10,000, and upon the payment of any fewer number of premiums (not less than two), to a proportionate sum,—that is, to a new paid-up policy for a sum bearing the same ratio to $10,000 that the number of annual premiums actually paid bears to 14, which was considered the equitable or surrender value of the policy. This election of the assured to take a paid-up policy was to be manifested by giving notice of intention to the company within six months after the cessation of the policy in consequence of the nonpayment of any annual premium when due. The stipulation, it will be noticed, is, in legal effect, for continuation of the contract of insurance between the same debtor and creditor, upon the same consideration, and, by necessary implication, upon the same conditions, only for a less sum; viz., for the value of the policy, which was of easy and certain mathematical computation. We can perceive nothing in the terms of the new policy, or the circumstances of its issue and acceptance, which indicates an intention of the parties to make a new contract discharging or extinguishing the old one. The policy itself does not constitute the contract. It is merely the written evidence of it. Its surrender, therefore, is not necessarily a surrender of the rights acquired under it. The consideration upon which the first or original policy issued was the representations contained in the application for insurance and the premiums. There was no other or additional consideration for the second or paid-up policy. No new condition appears in it in anywise detrimental to the company, nor is the one paper in any sense a higher security than the other. No word or clause is used in the latter policy indicating any intention to abandon the valuable right acquired under the first policy to hold the stockholders in-

dividually liable for the payment of the amount due on it on a corporate dissolution of the company. We have seen above that this right was part and parcel of the contract of insurance, and cannot be construed to have been abandoned, except by a new contract made with a mutual intention to dissolve the former engagement to which it inhered as if incorporated in it. The *onus* is on the defendants to show that the taking of the new policy was in discharge of the contract evidenced by the first policy, or that it was a novation; the whole question being one of intention to be established by facts. Keel v. Larkin, 72 Ala. 493; Lee v. Green, 83 Ala. 491, 3 South. Rep. 785; McCrary v. Carrington, 35 Ala. 700; Marshall v. Marshall, 42 Ala. 151. A novation, under the rules of the civil law whence the term has been introduced into the modern nomenclature of our common-law jurisprudence, was a mode of extinguishing one obligation by another,—the substitution, not of a new paper or note, but of a new obligation in lieu of an old one,—the effect of which was to pay, dissolve, or otherwise discharge it. 1 Pars. Cont. 217; Butterfield v. Hartshorn, 26 Amer. Dec. 741; Bonnemer v. Negrete, 35 Amer. Dec. 217. It is observed by Pothier, in his Treatise on Obligations, No. 559, touching this subject: "If, since the debt was contracted, a new agreement has taken place between the creditor and debtor, by which a longer time of payment has been given, or a new place for the payment appointed, or the debtor allowed the liberty of paying to another person than the creditor, or even by which the debtor should have bound himself to pay a larger sum or a lesser one, to which the creditor was willing to confine his demand,—in all these cases and the like, according to the principle that the novation is not to be presumed, it must be decided that there has been no novation, and the parties intended only to modify, diminish, or augment the debt, rather than extinguish it, in order to substitute a new one to it if they did not explain themselves." It has been accordingly held, under this principle, in the state of Louisiana, where the civil law prevails, that there is not a novation where an agent has taken notes payable to himself for goods sold by him, and afterwards new notes for a longer time, but upon the same consideration, are executed by the purchaser payable to the principal. Hobson v. Davidson's Syndic, 8 Mart. (La.) 422.

In Insurance Co. v. Thomas, 74 Ala. 578, we held that an indorsement on a policy of insurance stipulating for a paid-up policy, on certain terms, was to be construed in connection with the original contract, with all its benefits and burdens, and not as a novation disembarrassed from the original conditions. A like rule applies in the present case. We may very easily test the soundness of the contention that a paid-up policy issued on new consideration, and in pursuance of an express agreement in the original policy to issue it, is a novation operating to extinguish the contract evidence by such original policy. As suggested by counsel, suppose any one assured, after complying with every stpulation imposed on him by the contract of insurance, had applied to the company to issue a paid-up policy, the application being made in due time and form. Upon the refusal of the company, it is clear that a bill for specific performance would lie to compel the issue and delivery of the policy. Would this be the making of a new contract upon any new consideration, or on new conditions? A court of chancery would have no jurisdiction to do this. It could not introduce a new contract in substitution for, or extinguishment of, the old one. It could not dissolve the former one, nor expunge any of its accessories or incidents. It could only compel the carrying out of the contract already agreed on between the parties. And we see nothing in the issue of the present paid-up policy of Mrs. McDonnell essentially different from the suggested case, so far as concerns the question before us. So, if the whole number of premiums (14 in number) had been paid, and the company had voluntarily issued a new policy for the full amount of $10,000 in the words of the old one, we cannot see that any intention could be inferred to relinquish the security afforded to the assured by the individual liability of the stockholders, which is an obligation primary and original in its nature, by the mere fact of the intermediate repeal of the statute creating this liability. It is our opinion that the canceling of the original policy and the issue of a paid-up policy in its stead, pursuant to the express agreement to do so, is a mere continuation of the former contract of insurance, unaffected by the new law, as promulgated by the constitution of 1875 and the Code of 1876. This substitution of one pa-

per for another paper was a change merely in the evidence or proof of the contract, as modified in accordance with its own original terms. It could not have been intended to release the security afforded to policy-holders by the individual liability of stockholders, on the faith of which, it must be presumed, credit was largely extended to the company. It follows from these views that the chancellor erred in sustaining the demurrers of the defendants to the amended bill of the appellant Mrs. Kate McDonnell and others suing on paid-up policies of insurance issued since December 5, 1875; and that he committed no error in overruling the other assignments of demurrer. The decree will be reversed on the appeal of Mrs. Kate McDonnell and others, and remanded, that a decree may be rendered in accordance with the foregoing opinion. The appellees will take nothing on their cross-assignments of error, all of which are overruled.

Accord. People v. Security Life Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522; Com. & American Life Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. Rep. 844.

Note. The fact that the company was insolvent when the policy was issued does not render the contract void in the absence of fraud. Clark v. Middelton, 19 Mo. 53; Ewing v. Coffman, 12 Lea (Tenn.) 79.

BOSTON & A. R. CO. et al. v. MERCANTILE TRUST & DEPOSIT CO. of BALTIMORE et al.

Court of Appeals of Maryland. March 24, 1896. 82 Md. 535.

Insolvency—Special Assets—Preferred Claims—Taxes—Expenses—Wages of Employes—Renewal of Policy.

McSherry, C. J. There are 20 appeals in the record now before us. The cases were elaborately and ably argued during the last October term of this court, and the preparation of the opinion was then assigned to the late Chief Judge Robinson. His lamented death occurring shortly afterwards with-

out his having done more than hurriedly sketch an incomplete outline of some of the many questions involved, delayed a decision till now. We have had the benefit of Judge Robinson's notes, and will avail of them in this opinion.

The American Casualty Insurance & Security Company of Baltimore City was incorporated under the laws of Maryland in January, 1890, and began operations with a paidup capital stock of $1,000,000. Its business embraced many and divers lines of insurance and indemnity. It was authorized to write and did write policies of insurance against accidents, against losses by railroads and street railways arising from injuries to property and persons, whether passengers, employers, or strangers; and it engaged in various other kinds of indemnities. In a little less than four years its whole paid-up capital, with the large sums which it had received in premiums,—except, however, the funds in court for distribution,—has been swept away by losses, and there are now outstanding liabilities due by it in a very large aggregate amount and to many thousand creditors. Becoming hopelessly insolvent, a bill was filed against it by some of its creditors, and an order was passed thereon on November 23, 1893, appointing receivers to take charge of its assets. The receivers now have in hand certain funds of the insolvent company, and the questions before us relate to the method of distributing the same. A portion of these funds is invested in certain securities which had been deposited by the company with the treasurer of Maryland, and the residue consists of moneys derived from other sources; and the question which is presented at the threshold is whether the proceeds of these securities, when sold, and the accrued and accruing interest thereon, constitute a special or trust fund applicable to a particular purpose,—to the payment of a particular class of creditors,—or are general assets, available for the settlement of all claims due by the insolvent company. All of the questions involved were passed upon by the court below in its order of August 8, 1895, from which order the pending appeals were taken.

After determining by this order what was the special and what the general fund, and after directing how the commissions, costs, and auditor's fees were to be paid, the circuit

court ordered that the taxes claimed to be due to the mayor and city council of Baltimore were not properly chargeable upon the assets in the hands of the receivers, and, further, that there were three classes of creditors. The order then proceeded to define each of these classes, and prescribed rules for ascertaining the different values of the several policies held by them. Following, with a single exception, the paragraphs of the order appealed from we come first to the question relating to the division of the funds into a special and a general fund. At the time of the appointment of the receivers there was standing in the name of the Honorable Spencer C. Jones, treasurer of Maryland, Baltimore City stock of the par value of $200,000, which had been deposited with him by the company as a guaranty for the payment of the policies issued by it. On December 2, 1893, the receivers filed their petition in the circuit court, setting forth the facts in reference to the deposit of these securities, and praying the court to require Mr. Jones to transfer and deliver them to the petitioners, in order that the same might be administered under the order and direction of the court. To this petition an answer was filed by Mr. Jones, asserting that these securities were held by him as a trust fund for the benefit of the policy holders of the company, and that they could not be applied to any other or different purpose. Presenting this view, he submitted to such decree as the court might deem proper to pass in the premises. Upon the petition and answer a decree or order was passed whereby Mr. Jones, the treasurer of Maryland, was directed to assign and deliver this Baltimore City stock to the receivers, to be held by them for the benefit of the policy holders, subject to the further orders of the court. Whether this fund is a special or trust fund, or, on the other hand, belongs to the general assets of the company, depends entirely upon the facts and circumstances under which it was deposited with Mr. Jones. If these are such as to create a trust in behalf of the policy holders, then the fund must be applied as the terms of the trust direct. In determining whether or not a trust has been created courts will take into consideration the situation and relations of the parties, the character of the property, and the purpose which the settler

had in view in making the declaration. No technical terms or expressions are needed. It is sufficient if the language used shows that the settlor intended to create a trust, and clearly points out the property, the beneficiary, and the disposition to be made of the property. 27 Am. & Eng. Enc. Law, 26, and the citations in notes 1, 2, 3. In this case the trust is alleged to have been created by an accident insurance and security company doing business in all parts of the country, and having its home office in this state. In many states of the Union insurance companies of every kind doing business in such states are required to deposit with some one of the state's officers a certain named sum of money or approved securities of a designated value, as a guaranty for the payment of losses sustained by the policy holders. And in this state every life insurance company is required to deposit with the treasurer of the state public securities of the value of $100,000 as a guaranty for the payment of the policies issued by the company. The American Casualty Company, it is insisted, however, is not a life insurance company, within the meaning of the code of Public General Laws, and was not, therefore, obliged to make a deposit of any kind with the treasurer; and, further, that the treasurer, as such, had no lawful authority to accept such deposit. We need not stop to consider whether the deposit in this case was made by the company under the impression that it was a statutory requirement, or whether it was made voluntarily, with a view to strengthen its credit, and to give confidence to its policy holders of its ability to meet its obligations. The fact is, the company did make the deposit with Mr. Jones, and did take from him at the time the following certificate: "I, Spencer C. Jones, do hereby certify that I am treasurer of the state of Maryland, and that the American Casualty Insurance and Security Company of Baltimore City, a corporation chartered by said state, and located in the city of Baltimore, has deposited in this office securities of the denominations and descriptions particularly set forth and described in the schedule signed by me and hereto annexed, amounting in par value to the sum of two hundred thousand dollars; and I further certify that said securities are now held by me, as such treasurer aforesaid, in my

official capacity, on deposit as a guaranty for the payment of the policies of insurance issued by said company. In witness whereof I have hereunto set my hand at the city of Annapolis this twenty-eighth day of July, A. D. 1892. Spencer C. Jones, Treasurer of Maryland." The schedule annexed to this certificate is entitled, "Schedule setting forth the several denominations and a particular description of the stocks and other securities * * * held by me in trust for the policy holders of the American Casualty Insurance and Security Company of Baltimore City, as stated in the foregoing certificate." Here, then, is an express declaration by the trustee that this City stock was deposited with him by the company, and that it was held by him in trust as a guaranty for the payment of its policy holders; and this certificate was delivered by Mr. Jones to the company, and was in its possession at the time the receivers were appointed. An intention to create a trust of this kind may be inferred from conduct and circumstances without any express declaration. Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. 517. In the case at bar we have the most explicit proof of the creation of the trust, for there is the unequivocal declaration of the trustee that he held the funds in trust; and by the acceptance of the certificate there is the direct admission on the part of the company itself as to the existence of the trust, and there is a clear designation of the cestuis que trustent who are entitled under it. This is sufficient. Smith v. Darby, 39 Md. 268,—a case directly in point. The evidence of the trust, then, is conclusive, not only as to its creation, but also as to the objects and purposes for which, and the persons for whose benefit, it was established. And in reply to the objection that Mr. Jones has no right to accept the deposit as treasurer of the state it is sufficient to say that it is quite immaterial whether he held it in his official or in his individual capacity. If a trust existed, it will not be defeated by the inability of the trustee to act. A court of equity will never suffer a trust to fail for the want of a trustee. Nor can the action of Mr. Jones, in surrendering the fund under an order of a court of equity to the receivers, be held to have revoked the trust, or to have in any manner affected the rights of the cestuis que trustent thereunder. If he did not care to

take upon himself the responsibility of distributing the fund among the parties entitled to it, he had the undoubted right either to invoke the aid of a court in its distribution, or upon the petition of the receivers to surrender it to the court, whose officers the receivers were. As to section 205, art. 16, of the Code, which requires trustees to whom any property has been conveyed or limited for the benefit of creditors, or to be sold for any purpose, to give bond, to be filed with the clerk of the court, it is only necessary to say that it has no application to a trust of this character. That section relates only to the assignment or conveyance of property for the purpose of sale, and it provides that no title shall pass to any trustee until such bond shall be filed and approved, and that no sale made by any such trustee without such bond shall be valid. For the reasons we have given, we agree with the court below that the funds arising from the sale of the City stock and the interest accrued and accruing on that stock until sold must be treated as impressed with a trust, and must be applied solely to the payment of the claims of the policy holders, subject, however, to such prior or paramount liens upon it as will be hereinafter alluded to.

We have just said that we agree with the court below in that part of the order appealed from which defines the special and the general funds, but we cannot concur in that portion which provides that the general fund shall be set apart for the payment of all creditors "other than the claims of the policy holders." The policy holders, after they have exhausted the special fund, are entitled to participate, along with all other creditors, in the general fund. Passing by, for the moment, the intervening provisions of the order relative to the costs and commissions, and which will be disposed of later on, we come now to the claim filed by the mayor and city council of Baltimore for taxes. This appeal presents two questions: First, whether the tax levied by the municipality for the year 1893 upon the shares of stock of the company held by residents and nonresidents is a debt due and payable by the company or only collectible from the shareholders; and, secondly, if the tax be a debt due and payable by the company, is it a prior lien over the claims of all other creditors? These taxes

cannot, of course, be considered a debt due by the company unless they are made so by statute, because the shares of stock are the property of the shareholder, and, under the Code, must be valued to him. But the Code further provides that the shares of stock of corporations owned by residents or nonresidents of the state shall be valued at their actual cash value, "but the tax assessed on such stock shall be levied and collected from said corporation, and may be charged to the account of such nonresident stockholders," and shall be a lien on the shares held by them respectively. Code, art. 81, § 138, as to nonresidents, and section 141 as to residents. The statute thus makes explicit provision for a certain and prompt method of collecting the taxes due upon shares of stock, whether held by residents or nonresidents, by imposing upon the corporation the obligation and the duty to pay the tax itself. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. National Bank v. Com., 9 Wall. 353. And when this court came to deal with the same question (American Coal Co. v. County Com'rs of Allegany Co., 59 Md. 197) we held that, "the statute having created the duty and obligation to pay when the shares are assessed to the individual owners, that duty and obligation on the part of the corporation may be enforced by a proper action at law." If these taxes are a debt due by the corporation, they are a debt due by it, and to be paid by it, regardless of any dividends or profits payable by the corporation to the shareholder, and out of which it might be reimbursed. New Orleans v. Houston, 119 U. S. 265, 7 Sup. Ct. 198. Though this is conceded to be so while the corporation is a going concern, the contention is that when the company becomes insolvent, and its property has passed into hands of receivers, such taxes cannot be held to be a debt of the corporation for the payment of which its assets are liable. In reply to this it may be observed that the tax is, by the express terms of the statute, charged to and made payable by the corporation. If this be so, and if the tax was due at the time of the insolvency, then obviously the insolvency could in no manner affect the right of the city to demand payment out of the company's assets. By article 4, § 827, Code Pub. Local Laws, the city of

Baltimore is empowered to levy taxes annually upon the assessable property of the city, and to provide by ordinance for the collection of the same. The city has provided by ordinance that taxes levied shall be paid on or before the 1st day of October in the year for which the levy was made, and that the collector may enforce the payment of the same after giving 30 days' notice. These taxes were consequently due when the company's assets passed into the hands of the receivers, and, being then due, the act of 1892 (chapter 518) directs that they shall be paid and satisfied by the officer or person selling under judicial process the property, real or personal, upon which such taxes are payable. As these taxes were due and payable when the company became insolvent, they are, in our opinion, a prior lien upon the assets in the hands of the receivers, and must be paid out of the general fund, and, if that should be insufficient, the balance must be paid out of the special fund.

This brings us to that part of the order of August 8th which classifies the various creditors, numbering in the vicinity of 4,000. The order divides these creditors into three groups: First, Clerks, servants, and employés to the extent of their salaries or wages due and unpaid for not exceeding three months prior to the appointment of the receivers. These creditors are allowed their claims for salaries and wages due and unpaid for not exceeding three months prior to November 23, 1893, as preferred claims, under article 47, § 15, of the Code; and such allowance is free from objection, but is, in no contingency, payable out of the special fund. Second. Policy holders of the company. And, thirdly, all other creditors.

First. Who are included within the terms, "clerks, servants, and employés"? By the section of the Code to which reference has just above been made it is provided that "whenever any person or body corporate shall make an assignment, * * * or shall be adjudicated insolvent, * * * * or shall have his, her or its property or estate taken possession of by a receiver, * * * * in the distribution of the property or estate of such person or body corporate all moneys due and owing from such person or body corporate for wages or salaries

to clerk, servants or employés contracted not more than three months anterior" to such assignment, insolvency, or receivership, "shall first be paid in full," etc. Under no circumstances can these claims be paid out of the special or trust fund. That trust, as we have said, was created for a particular purpose, and it was created as far back as 1892, long before any debt now due for wages or salaries, and entitled to priority under the statute, was contracted. The trust fund devoted to a special purpose cannot, therefore, be considered such property and estate belonging to the company at the time it became insolvent as would be liable for the satisfaction of these claims. In the case of Lewis v. Fisher, 80 Md. 139, 30 Atl. 608, we held that an attorney at law was not a clerk, servant, or employé, and we have now to determine whether an insurance adjuster is within these terms. What is the precise nature of the duties of an adjuster, the record does not disclose. But an adjuster was not, as we understand it, a person in the continuous employment of the company; that is, one who devoted his whole time and service uninterruptedly to the company. In his petition Mr. Phelps says he was employed as an adjuster in the state of Alabama at a salary of $1,000 and expenses. It was his duty and the duty of other adjusters, when an accident occurred, to ascertain all the facts and circumstances in connection with such accident,—how it happened, whether it was through the fault of the insured corporation, the nature and extent of the injury, and to make report thereof to the company. All this involved the exercise of judgment and discretion, and required some familiarity with the principles of law relating to the legal liability of the insured. Now, it is clear, we think, that the word "employé," as used in the statute, was intended to have a limited meaning, and that it cannot be applied in its broadest sense, or as including every one in the service or employment of a corporation or individual. The object of the statute was to provide for the payment of the wages and salaries due a certain class of persons to whom such wages or salaries were deemed always necessary for their support and maintenance. The statute first provides for the payment of the wages and salaries of clerks,—persons rendering mere

clerical services,—then of servants or employés. The statute did not mean by "employés" persons rendering services of a higher degree than clerks. The duties of an adjuster being, as far as we are able to discover, of the character we have described, these officers, while in a general sense employés, cannot, by any fair rule of construction, be considered employés in the limited and restricted meaning of that term as used in the statute. To hold otherwise would result in the inclusion of a large class of persons in the service of a company or individual, as preferred creditors, though they are obviously not within the scope, purpose, and object of the Code, under which provision is made for a preference. But it was insisted that the conclusions reached by this court in Lewis v. Fisher, supra, are in conflict with the decision in Moore v. Heaney, 14 Md. 558. Such is not, however, the fact. Two entirely different statutes, relating to different subjects, were construed in the two cases. In Moore's Case the act of 1854 (chapter 23), relating to the exemption of the wages or hire of "a laborer or other employé" from attachment, was interpreted; while in Lewis' Case the identical statute now involved—the act of 1888 (chapter 383, art. 47, § 15, Code)—was before us. In Moore's Case this court gave a wide and liberal meaning to the word "employé," so as to bring as large a class of persons as possible within the provision which created an exemption in favor of laborers and other employés from the stringent terms of the attachment law, and from the equally harsh effects of an attachment levied by way of execution on wages. The act of 1854, creating an exemption in favor of a class of persons least able to protect themselves, and largely dependent on their wages for support, was given a liberal, and not a technically strict, construction, that might, perhaps, have been placed upon it. But the act of 1888 (article 47, § 15, Code) was designed to create a preference in behalf of certain creditors in the distribution of an insolvent's assets, and to that extent it disturbs and destroys the equality among all the creditors, which equality it was the obvious, if not declared, policy of the insolvent system to promote and preserve. Hence it was that, without questioning the decision in Moore's Case, which defined the

words "other employé," as used in a statute, relating to one subject, we gave in Lewis' Case to the term "employé" as used in another and a totally different statute, and as restricted by the context and by the words with which it was associated, a less comprehensive signification. The same word, used in different statutes relating to different subjects, does not necessarily have the same meaning. As observed by Pollock, C. B., in Reg. v. Skeen, Bell. Crown Cas. 97, "There is no word in the English language which does not admit of various interpretations."

We come now to the rules laid down in the order of August 8th for ascertaining the values of the various policies, and it will be necessary, for the sake of clearness, to make some general reference to the nature and character of these contracts of insurance or indemnity. No useful purpose could be served, but this opinion would be protracted far beyond all reasonable limits if the provisions and stipulations contained in the various policies were set forth at large. We may say, however, that with suitable modifications and changes to adapt them to the particular character of loss designed to be covered in each case, and to adjust them to the sort of business in which the insured was engaged, all the policies purport to be either individual accident insurance policies, employers' indemnity bonds, or contracts under which, for a designated and agreed consideration, the company stipulated to indemnify the assured against liability for damages (not exceeding a specified amount) which might arise out of injuries to property or out of an injury to or the death of certain persons standing in various relations to the assured, these injuries, both to persons and to property, and these deaths, happening upon described premises, and being such as the assured might, in consequence of being responsible for their occurrence, be legally bound to answer for in damages. The object of the insurance, then, except in the case of a mere individual accident policy, was to provide means with which the assured might be reimbursed for any loss he had sustained if he were the holder of an employé's indemnity bond, or for any damages which he might lawfully be required to pay, and did in fact pay, by reason of such injuries or deaths as the policies

covered, if he were the holder of the other classes of indemnity. The amount actually paid by the assured to the person injured, or to the representatives of the person killed, or to the owners of the property damaged or destroyed, settled and measured, within the limits specified in the policy, the extent of the insurer's liability. And while the mere liability of the assured to pay unascertained damages for any of the causes set forth in the contract of indemnity did not determine the precise amount which the insurer was bound to pay to reimburse the assured, it nevertheless fixed the insurer's liability to the assured under the contract. The happening of the event which subjected the insured to a claim for damages established the period when the correlative obligation of the insurer became complete and ceased to be contingent, except as to the amount to be paid. The liability of the insurer was thereby fixed, though the extent of that liability might, and in most cases must, necessarily, have been unascertained until a subsequent period.

Now the insolvency of the company cancelled all outstanding policies of insurance for the future. Doane v. Insurance Co., 43 N. J. Eq. 522, 11 Atl. 739. It is apparent that all casualties for which the various insured corporations and individuals holding the insolvent company's policies might be responsible must have happened either before or after the date of the insolvency. If the accidents which form the basis of the claims now made for indemnity happened after the insolvency was declared, then, inasmuch as the insolvency canceled the policies, there can be no claim under the policies; but as the company, by its insolvency, committed a breach of its contracts, the policy holders thereupon became entitled to damages for that breach, and these damages are the values of the destroyed policies. Mason v. Cronk, 125 N. Y. 503, 28 N. E. 224; People v. Security Life Insurance & Annuity Co., 78 N. Y. 125. The policies being thus destroyed, of course all liability under them, from the date of the insolvency, for accidents occurring subsequently to the insolvency, ceased. Consequently losses which happened after the insolvency under policies in existence at the date of the insolvency, are not provable against the funds in the receiver's hands. While

this is so, the values of the destroyed policies are provable, and, according to well-settled rules, these values consist solely of the unearned or return premium. And this the circuit court decided. With respect to the other category,—the occurrence of the casualty before the date of the insolvency,—there are two contingencies presented: First, where the accident or injury insured against occurred, and the damages were ascertained and actually paid by the assured, before the appointment of the receivers; and, secondly, where the accident or injury insured against happened before the appointment of the receivers, but the amount recoverable from the assured remained unascertained and unpaid till after that date. As to the first of these contingencies, and in so far as the policy covers no other loss, there is and can be no dispute, and the court below properly held with respect to such policies that their value was a sum of money equal to the sum of the loss and the return or unearned premium. But as to the second of the above contingencies we think the court was in error. With respect to the policies falling within this second contingency the order of August 8th declared: "But no cause of action nor action nor suit pending against the claimant, nor judgment nor decree against the claimant, unsatisfied before November 23, 1893, by the claimant, is a loss sustained by the claimant, nor can any claim be made or any judgment or decree rendered against the claimant and satisfied by him prior to November 23, 1893, except for the amount actually paid in settlement thereof." As already observed, these policies, in so far as they related to a period subsequent to the appointment of the receivers, and covered no antecedent loss or injury, were, by operation of law, annulled when the company became insolvent; but for the consequences of accidents or other casualties which occurred anterior to the insolvency, and which subjected the assured to a liability or a loss the amount of which remained undetermined or unsatisfied until after the receivers were appointed, the policies were unaffected, and the obligations arising under them were unimpaired by the company's insolvency. It is not solely because the insured has actually paid damages that the liability of the insurer to him is fixed, but it is because an accident

or casualty or occurrence has happened for which he is responsible, and against the loss arising from which he has been indemnified, that the obligation of the insurer to reimburse him arises, though the precise amount to be paid by the insurer may depend for its ascertainment upon events happening after the insolvency. In other words, the contingent liability of the insurer to reimburse the insured becomes a fixed liability the moment an event happens which fastens a responsibility on the insured, if that event be within the terms of the policy; but the amount of the liability continues to be contingent till the precise extent of the demand against the insured is established and paid. This contingency as to amount in no manner derogates from the fact that a liability for some amount has arisen and becomes fixed. In all instances, therefore, where the loss or injury happened before the insolvency, though the amount thereof was not ascertained and was not paid by the insured until after the insolvency, the holder of the policy will be entitled to prove for a sum equal to the loss or damages paid by him, plus the return premium, if any. What has been said above is sufficient to indicate that we also dissent from the third rule laid down by the circuit court for ascertaining the value of the class of policies in that rule referred to. When the liability became fixed prior to November 23, 1893, the insolvency on that date did not extinguish the assured's claim upon the assets, and did not put an end to the assured's right to indemnity. To the return premium in the cases described in this rule must be added what would have been payable under the policy after November 23d, had no insolvency supervened. If by the fourth rule laid down in the order of August 8th it is meant that no loss arising from occurrences which happened after November 23d gives rise to a claim against the assets, we see no error in the rule; but if it means that no such claims exist if the accident or casualty occurred before November 23d, and the amount was not ascertained until after that date, then, for the reasons we have heretofore given, we regard this fourth rule erroneous.

There must of necessity be many outstanding and unascertained claims pending against holders of the company's policies, which claims may require some time for adjustment; but it

is of great importance that the company's assets should be distributed at as early a date as practicable, and hence the settlement of its affairs ought not to be postponed to await the determination of every contingency on which its policy engagments are suspended. Carr v. Hamilton, 129 U. S. 256, 9 Sup. Ct. 295. To obviate all unreasonable delay, and yet to afford an opportunity to each policy holder who may be entitled to prove against the company's assets, it will be the duty of the circuit court to prescribe by an order that all claims be filed on or before the second Monday of June next, or otherwise barred from participation in the distribution. This may result in cutting out some claims, but that will be unavoidable unless the distribution be postponed for a considerable space of time; and such a course would occasion unnecessary loss to those whose claims are in a condition to be proved. If by that date there should be outstanding claims not reduced to a certain basis, it will be the misfortune of the assured; but there is no way of obviating that misfortune. May, Ins. § 594a. By a prior clause of the order of August 8th it was provided "that each owner and holder of, or person having any lawful claim upon, any of said classes of insurance policies or any similar policy of the defendant corporation, issued prior to November 23, 1893, for a period to extend beyond said date, who duly paid the premium thereon for the entire period or any portion of it extending after November 23, 1893, as agreed between the policy holders and the said company, is entitled to claim upon the value thereof on November 23, 1893, and to receive dividends upon such value out of the net special fund." If the design of this provision was to exclude all policies which did not cover a period of time extending beyond November 23, 1893, the provision is obviously erroneous. Such an exclusion would cut out a claim matured and perfected during the life of the policy whose limit of duration terminated the day before the appointment of the receivers, and under which nothing remained to be done by the insurance company but to reimburse the insured. In respect to that part of the order which charges the special fund with the payment of costs and expenses that the general fund may be insufficient to meet, is only necessary to say

this special fund, being a trust fund devoted to a particular and specified purpose, cannot be diverted therefrom, or applied to any other or different object; and, except in so far as it is liable for the payment of the taxes which are paramount to all other claims, it must be distributed to the policy holders for whom it was set apart, and can be charged with no portion of the costs and commissions incurred in administering a totally distinct fund.

But two questions more remain to be considered. One is of considerable interest. In the argument at the bar it was insisted with great earnestness and marked ability that all policies issued by the casualty and indemnity company to carriers of passengers indemnifying the carriers against their liability for injuries to persons are void, because contrary to public policy. The contention is that, as the law exacts from the carrier of passengers the exercise of the utmost care and diligence which human foresight can use to avoid an injury, any contract which relieves the carrier of his duty to the public in this regard, or lessens his liability for all or any of the willful, criminal, and negligent acts of his employés or his managers and himself, is detrimental to the interests of the public as understood by the courts at this time, and is therefore repugnant to public policy. No exact definition of public policy has ever been given or can be found. Speaking generally, the principle which holds that no one can lawfully do that which has a tendency to be injurious to the public, or against the public good, may be termed the policy of the law or public policy in relation to the administration of the law. 19 Am. & Eng. Enc. Law, 565. In Richardson v. Mellish, 2 Bing. 229, Mr. Justice Burroughs pointedly observed: "I for one protest against arguing too strongly upon public policy. It is a very unruly horse and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when all other points fail." It is one thing at one time, another thing at another time, and its very vagueness shows that it does not admit of exact or precise definition, and that it is not easily explained. "If this statement requires authority," said Kekewich, J., in Davies v. Davies, 36 Ch. Div. 364, when

discussing public policy as affecting contracts in restraint of trade, "turn to Egerton v. Earl Brownlow, 4 H. L. Cas. 1, and consult the arguments of counsel and opinions of judges covering the whole subject. * * * One thing I take to be clear, and it is this: that public policy is a variable quantity; that it must vary, and does vary, with the habits, capacities, and opportunities of the public; that it cannot have been the same when Chief Justice Tindal decided Horner v. Graves, 7 Bing. 735, in 1831, as it was when Chief Justice Parker decided Mitchel v. Reynolds, 1 P. Wms. 181, in 1711; that it must have changed and did change between 1831 and 1869, when Vice Chancellor James decided Cloth Co. v. Lorsont, L. R. 9 Eq. 345; and, if there had not been further change before Lord Justice Fry decided Rousillon v. Rousillon, 14 Ch. Div. 351, in 1880, it must have occurred ere now." The wisdom and correctness of these observations are strikingly illustrated in the development and change and expansion of the law from the crude, rigorous, and harsh exactions of past centuries to the liberal, enlightened, and advanced policy of to-day in relation to the liability of a carrier of goods, his right to restrict that liability by contract, and to insure against loss and injury the property intrusted to him, and of which he himself is, under the law, an insurer. By the common law the carrier was treated as an insurer, and was bound to keep and carry safely all goods consigned to his care, and he was liable for all loses, and in all events, except for losses caused by the act of God and the king's enemies. Chit. Carr. 349; Railroad Co. v. Green, 25 Md. 89. This rule of responsibility did not have its origin in contract, but was founded on grounds of public policy. "For though," said Lord Hall in Coggs v. Bernard, 2 Ld. Raym. 909, "the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable; and this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their dealings; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, and yet doing it in such a clandestine manner as would not be possible

to be discovered." Afterwards, when the better administration of the law afforded greater protection to the carrier against the depredations of thieves, and had lessened the opportunities for fraud and collusion, the strict rule of the common law was measurably relaxed, and the carrier was permitted to limit his responsibility by special contract where the limitations were just and reasonable. But even this departure was of gradual development, for in Barney v. Prentiss, 4 Har. & J. 317, the court declined to express an opinion on the carrier's right to restrict his liability; but in Brehme v. Express Co., 25 Md. 328, the right was distinctly recognized, and is undoubtedly now the law. Railroad Co. v. Lockwood, 17 Wall. 357; McCoy v. Transportation Co., 42 Md. 498. The conclusions reached in the carefully considered and exceedingly able opinion delivered in Lockwood's Case, supra, were: First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; secondly, that it is not just and reasonable, in the eye of the law, for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. While the carrier will not be permitted by contract or otherwise to exempt himself from liability for losses caused by his own negligence or the negligence of his servants, there is no reason of public policy which prohibits him from contracting with a third person for insurance against these very same losses. Consequently he may, by insurance, indemnify himself against loss of or injury to property intrusted to his care, even where the loss or injury is caused by his own or his servant's negligence. This was decided in Phœnix Ins. Co. v. Erie & W. Transp. Co., 117 U. S. 312, 6 Sup. Ct. 750, 1176; and the ground upon which the decision was based was that such insurance did not diminish the carrier's own responsibility to the owner of the goods, but increased the means of meeting that responsibility. Notwithstanding such insurance, the carrier remains liable to the owner or shipper of the goods, and by insuring them he merely contracts, as in every other instance of a reinsurance,

with some one else for reimbursement for such loss. The doctrine announced in the Phœnix Ins. Co.'s Case, supra, was affirmed in California Ins. Co. v. Union Compress Co., 133 U. S. 387, 10 Sup. Ct. 365, and is the settled law of the land. A reasonable restriction by contract of his common-law liability and an insurance by the carrier of goods against loss are recognized by the law, and are not in contravention of its policy today, whatever that policy might have been heretofore. It is obvious that a carrier of passengers cannot by contract restrict, diminish, or limit that obligation to the public or that duty to the passenger which requires the exercise of the highest degree of care and diligence on his part. A contract which stipulates for or agrees to such relaxation, and, therefore, contemplates immunity from the carrier's own negligence, would be utterly void; precisely as would a contract purporting to relieve a carrier of goods from liability for losses occasioned by his own or his servant's negligence. But the policies before us are not contracts of that character. Neither in express terms nor by implication do they profess or purport to abridge in any way the carrier's common-law liability for injuries to passengers, employés, or strangers. These policies leave that liability precisely where, and as complete as it was before they were written. They contain no provision impugning or questioning in the slightest degree the full measure of that responsibility. It is perfectly manifest, therefore, that they are not in terms contracts restricting or attempting to restrict the carrier's conceded liability; and, if they contravene public policy at all, it must and can only be incidentally and indirectly. This is all that can be imputed to them. But they are, it is alleged, repugnant to public policy because by furnishing the carrier with a fund with which to reimburse himself for losses caused by his own negligence their inevitable tendency or effect is to induce less vigilance or to promote greater carelessness on the part of the carrier. Precisely the same reasoning would invalidate, as repugnant to public policy, every species of fire and marine insurance. To the exent that a fire insurance policy affords an individual protection against loss, to exactly the same extent may it be said the assured will become indifferent in guarding against

casualties from fire. And in so far as a carrier may have a policy covering goods and insuring them for his own benefit against losses arising from his or his servant's negligence, just so far will he be either tempted to be negligent, or become indifferent as to vigilance. But in neither instance can it be said that, because a temptation to be negligent may possibly result from the possession of an insurance policy, the contract of insurance necessarily begets negligence, or conflicts with public policy. Nor can we assume as an unvarying rule, of which judicial notice will be taken, that a carrier of passengers, who has secured an indemnity to reimburse himself for losses which his own negligence may produce, will, merely because and solely in consequence of having such indemnity—which at best is but limited and partial—necessarily disregard the duty to exercise the highest degree of care. And unless it be assumed as a postulate that the mere possession of an indemnity will of itself necessarily and invariably produce negligence, it does not logically follow that such a policy or indemnity is even incidentally or indirectly repugnant to public policy. The indemnity in no way affects the liability of the carrier to the person injured. The utmost that it does, precisely as in the case of a carrier of goods, is to afford him a fund out of which he may be reimbursed, and that, too, perhaps, but partially; for in all these policies the liability of the insurer is always limited, and confined to a specifically designated sum. The compensation to an individual, whether passenger, employé, or stranger, is, after all, a money compensation, and, though the life or limb of a person may be, and most certainly is, of greater intrinsic value than goods and chattels, still the law knows of no other means of making compensation or approximate compensation in either instance than by the assessment of damages in dollars and cents. If in the development and progress of the law the ancient rules have been relaxed in the case of a carrier of goods as to enable him to insure against his own negligence when the result of the insurance is to furnish him the means to make compensation to the owner or shipper of goods, we see no valid reason for holding that the law, in its advance to conform to the "habits," capacities, and opportunities of the public, has not reached

the stage of allowing a carrier of passengers not to contract for a restriction of his original liability, but to purchase from a third party an indemnity fund with which to make more certain his ability to respond in damages for personal injuries caused by his carelessness and neglect. As public policy is a varying quantity, changing with the habits of the people, there is nothing in it, as it exists at this day, to warrant us in saying these policies infringe it. But how can an insurance or indemnity of this kind be contrary to that vague, indefinite, and "variable quantity" called "public policy," when no restriction is placed on the carrier's liability or duty to the public or to the individual, and no attempt is made in the contract of indemnity to interfere with the relations between the carrier and the public, or the carrier and the individual, as those relations existed under the law prior to the writing of the policy? We have said the only suggestion in answer to this inquiry is that a tendency to relax the carrier's vigilance necessarily results from the fact that under the policy a fund is provided out of which he may be reimbursed the sums he may be obliged to pay as penalties occasioned by his own negligence. But this not only does not meet the objection that no such relaxation of care and diligence is stipulated for in the contract of insurance or in any contract between the carrier and the passenger or other individual, but it lays out of view a consideration of which the most casual observer cannot fail to take note, and it is this: The carrier will, from motives of self-interest, if from none other, endeavor to reduce the sum total of his insurance to a minimum figure, and thereby diminish the amount of the annual premium payable therefor, while the aggregate of insurance which he may be able to procure, as well as the rate charged him for it, will always depend in a large measure, if not entirely, upon the prudence, care, and skill with which his affairs are managed and conducted. Such a carrier has, consequently, exactly the same motive or incentive to protect the public and the individual from injury that he would have if he should become his own insurer, or were a carrier of goods, and therefore the insurer of them. Stretching the doctrine of public policy to the extent of striking down these policies

would, in the language of Mr. Justice Burroughs, "lead you from the sound law." And as, according to the same learned justice, this doctrine "is never argued at all but where all other points fail," it would be of doubtful expediency to invoke it where the only apparent consequence of obtaining such insurance would be, not to diminish the carrier's own responsibility, but rather to increase his means of meeting that responsibility. The fallacy of the objection urged against the validity of these policies lies in the failure to distinguish between a contract which, on the one hand, stipulates with the passenger for immunity on the part of the carrier from the consequences of the latter's breach of duty, and a contract whereby, on the other hand, the carrier, while in no way diminishing that liability, merely agrees with a third person to procure from the latter a fund out of which to pay, perhaps the whole but at least a portion, of the damages which he may be chargeable with on account of his failure to observe and discharge his duty. As remarked by Mr. Justice Story in Insurance Co. v. Polleys, 13 Pet. 164: "We all know that there are cases where a contract may be valid notwithstanding it is remotely connected with an independent illegal transaction, which, however, it is not designed to aid or promote." Now, it is perfectly obvious the casualty company never intended, by writing policies for carriers of persons, to aid or promote carelessness or negligence on the part of the assured. Its manifest interest to avoid the payment of heavy amounts to reimburse the assured for the damages which might be recovered in consequence of such negligence was alone sufficient to exclude the inference that by writing these policies its purpose was to aid or promote negligent, and therefore illegal, conduct on the part of the carrier; and, though its liability might depend on just such negligence, its contract was not made to promote it; nor did the underwriter, directly or indirectly, stipulate for any breach of duty by the carrier towards the public or the individual. The thing done by the insured might subject him to an action for damages because wrongfully done, but the distinct and independent contract to partially reimburse him those same damages was in no respect designed to aid, assist, or advance any such illegal act. In

the case last above cited from 13 Pet., a policy of insurance written upon a schooner for the term of one year was the cause of action. The schooner was totally lost by the perils of the sea while the policy was in force. The insurance company insisted that the schooner, on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for a violation of the laws of the United States; and that, therefore, a policy on a vessel pursuing such a voyage was not valid, or legal and binding. The supreme court said: "The objection, then, as insisted on by the counsel for the insurance company, involved two distinct propositions. The first was that the schooner was sailing on the voyage under circumstances which rendered her liable to forfeiture. The second was that the policy on her was therefore void. Now, the first might have been most fully admitted by the court, and yet the second have been denied, upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no respect designed to aid, assist, or advance any such illegal purpose." We see no reason to hold that these policies are void because against public policy.

There is but one other question to be considered, and that relates to the claim of the West End Street Railway, one of the appellants. A policy was taken out by this company for a year expiring August 1, 1892. It contained a provision allowing the insured to renew, at its option, the same policy for three years from the above date. The insured gave notice of its intention to claim, and it did claim, an extension or renewal of the policy under the option, but the insurer refused to renew. The West End Company claims that the policy is still in force. To this we do not assent. If the insured intended to rely on the contract, it was its duty to have paid the premium, or at least to have tendered the premium and demanded a renewal. Dunyan v. Insurance Co., 46 Md. 493. It did neither, and the policy thereupon ceased to be effective.

We think no interest should be allowed on the claim for taxes, or on any of the other claims filed against the insolvent company. While not precisely analogous, the case of Hutchinson v. Insurance Co., 153 Mass. 143, 26 N. E. 439, supports

this conclusion. It is not easy, if indeed it be possible, to place upon a consistent basis many of the decisions in which interest has been allowed or disallowed. Perhaps some of the numerous claims might, in strictness, be entitled to an allowance of interest under ordinary circumstances, but it does not appear that the amounts asserted to be due have been wrongfully withheld by the casualty company. The failure to pay, as far as we can see, has been the result of the company's insolvency. A penalty or damages in the way of interest ought not, therefore, to be added to the sums actually due.

It results from what we have said that the order of August 8, 1895, will be affirmed in part and reversed in part, and the causes, except those that will be dismissed, must be remanded to the end that another order may be passed conforming to this opinion. Order affirmed in part, and reversed in part, and causes remanded to the end that another order may be passed in conformity to this opinion; one-half the costs in all the cases to be paid out of the general fund, the other half to be paid out of the special fund.

ENTERPRISE FIRE INS CO.'S RECEIVER et al. v. ENTERPRISE FIRE INS. CO. et al.

Court of Appeals of Kentucky. Feb. 5, 1904. 25 Ky. 1630.

Insolvency—Fraudulent Preference—Receiver.

Barker, J. This action was instituted by J. L. Watkins, receiver of the Enterprise Fire Insurance Company, and H. H. Sayler for himself and on behalf of various other creditors of the company, against the Enterprise Fire Insurance Company and the Union Savings Bank to recover the sum of $2,449.30, which it is alleged was paid by the insurance company to the bank in contemplation of insolvency, and for the fradulent purpose of preferring it to other creditors, in violation of the provisions of the statute commonly called the "Act of 1856" (1 Acts 1855-56, p. 107, c. 704). The Enterprise

Fire Insurance Company belongs to that class known as assessment or co-operative fire insurance companies, organized under the provisions of subdivision 5, art. 4, c. 32, Ky. St. 1903. In order to intelligently discuss the question before us, it will be necessary to examine the law under which the corporation was organized, and ascertain its rights, powers, duties, and liabilities.

Section 702, Id., provides: "Twenty-five or more persons residing in any one or more adjoining towns, or in any county, or in not exceeding ten adjoining counties, who collectively own property of the value of $50,000 or more, may become a corporation for the purpose of co-operative or assessment insurance against loss or damage of property by fire, wind or lightning, by making and acknowledging a certificate, setting forth their intention to form such a corporation, the county or counties, town or towns in which it intends to do business, its corporate name, and the place where its principal office is to be located. Every person insured in such a corporation, who shall sign an application for insurance, as required by the certificate of incorporation or the by-laws of the corporation, shall thereby become a member thereof."

Section 703 provides for the organization of the corporation.

Section 704 authorizes the commencement of business upon filing in the office of the insurance commissioner the articles of incorporation required, together with a sworn statement by three of the incorporators that bona fide agreements have been entered into for the insurance of an amount not less than $100,000 within the territory in which it proposes to do business.

Sections 706 and 707 are as follows:

"Sec. 706. The directors of every such corporation shall issue policies of insurance, signed by their president and secretary, agreeing in the name of the corporation to pay all damages, not exceeding the amount insured, which shall not be more than $5,000 on any one risk, done to dwelling houses, barns and their contents, and other property not more hazardous in cities or villages, detached at such distance as the by-laws of the corporation may prescribe, and their contents, and live stock owned on the premises, caused by fire, wind or lightning,

during the time mentioned in the policy. Every corporation may issue more than one policy to one person, firm or corporation having separate or detached buildings which it is not prohibited from insuring by this act or its by-laws. Every policy issued shall have attached thereto a printed copy of the by-laws and regulations of the corporation.

"Sec. 707. Every person insured in and by any such corporation shall give his undertaking in such form as the corporation may prescribe, which form shall be uniform between and by all the insured, to pay his pro rata share of all losses or damages sustained by any member thereof, from any cause specified in the policy to the corporation. He shall also pay such reasonable sum for expenses as the by-laws may require. Every policy holder sustaining a loss or damage, from any cause specified in the policy, shall notify the president or secretary of the corporation within sixty days after such loss or damage, and the proper officers of the corporation shall at once proceed to ascertain and adjust such loss or damage in the manner provided for by the charter and by-laws of the corporation and the provisions of this act."

Section 709 authorizes the corporation to borrow money on its credit sufficient to pay losses where it has no money on hand for that purpose, and also for assessment on the members to repay.

Section 710 limits the amount of the indebtedness which the corporation may incur, except for payment of losses, to an amount that will not require an assessment of more than 50 cents on each $100 of insurance in force.

Section 711 regulates the giving of notice and the requisites of assessments against the members.

By section 712 actions are authorized to by brought by the corporation against members to recover all assessments which they may neglect or refuse to pay, and further authorizes, where the corporation is compelled to bring actions to collect assessments, that, in addition to the amount assessed, there may be recovered 50 per cent as a penalty for the neglect and refusal to pay. The corporation is also given a first lien upon the property insured to secure the payment of the assessments and calls legally made under the contract of insurance. Fire in-

surance companies organized under this act are strictly co-operative in character. They have no assets, and are not required to have any, except the agreements of the insured to pay such assessments as may be necessary from time to time to make good the losses which may occur to their fellow members. The members of the corporation occupy a dual relationship to each other—they are both insured and insurers. The Enterprise Fire Insurance Company organized under this act, and began to do business. Losses having occurred, to pay which it had no money on hand, it borrowed sums from the Union Savings Bank, which, with interest after various renewals, amounted to the sum of $2,449.30. In April, 1901, it owed, in addition to the debt due the bank, losses which it was unable to pay, the total indebtedness aggregating in round numbers the sum of $13,000, at which time it concluded to go out of business, and wind up its affairs, a resolution having been passed by the board of directors for that purpose, which also directed the levy of an assessment upon the policy holders for the purpose of paying all its indebtedness. The company collected by this assessment about $5,000, out of which it paid off the indebtedness to the bank in full, some arrears in salaries, and $835.59 on fire losses, which at that time amounted to $7,000. On the 15th day of June, 1901, the company was placed in the hands of a receiver by legal proceedings, and subsequently this action was instituted. The issues were made up in the pleadings, so as to present to the court the question of fraudulent preference, within the provisions of the act of 1856, and upon final trial the circuit court dismissed the petition, from which judgment this appeal is prosecuted.

The first question to be determined is whether or not the receiver can lawfully maintain this action. In the case of Ray, Receiver, v. First National Bank of Louisville, 63 S. W. 762, 23 Ky. Law Rep. 717, which involved a question similar in principle to the one at bar, it was said: "The majority of the court, however, are of opinion that, inasmuch as the insurance company could not have recovered any part of the money in question from the bank upon the grounds relied on in the petition herein, * * * it necessarily follows that the receiver [the appellant] cannot prosecute this action." This

case seems to be conclusive of this question, and we are therefore left to determine only the rights of appellant H. H. Sayler, and those in whose behalf he sues, and who are creditors by season of fire losses sustained by them. As said before, the members of the corporation occupy the dual relation of insured and insurers. The corporation never had any assets except the agreement of its various policy holders to pay the losses occurring to their fellow members when assessed. These agreements constituting its only resource, and being authorized under the statute to do business as an insurance company, relying upon these agreements as a fund with which to pay losses, can it be said to have become insolvent when the facts show that it possessed on the day it went into liquidation all that it ever possessed? Undoubtedly, theoretically at least, it is true that a co-operative fire insurance company cannot be said to become insolvent with reference to the losses due to members because, under the statute, they are all insurers of each other, and, if necessary, each is bound to pay into the corporate treasury, upon assessment, a sum (not exceeding the face value of his policy) sufficient to make good all losses, which would exclude the idea that the corporation could be insolvent as to the losses, because, in the final analysis, if we may suppose such a state of affairs, each member sustaining a loss might become his own insurer. That such a system is unsound financially is obvious, but this is an infirmity in the law which permits it.

In the case of Bangs v. Gray, 12 N. Y. 483, a question arose as to whether or not the members of an insurance company similar to the one under consideration were bound only for a pro rata of a loss, taking into consideration all of the members, solvent and insolvent, or whether the solvent members would have to make good the entire loss. It was held that the solvent members were bound for the whole loss, the court saying: "Indeed, I do not see how to answer the argument of appellant's counsel that upon the other construction a company having some insolvent members must necessarily fail whenever the occurrence of a loss compels it to make an assessment. If it can only assess to the amount of the loss and the necessary expenses, and if such assessments must be upon all the mem-

bers, good and bad, the portion of such loss which ought to be paid by the insolvent members must be left unpaid; and, as the insured is entitled to recover the whole amount of his insurance, there will necessarily be a balance which there will be no means of paying." Now, the debt of the bank consisted of money borrowed to pay losses as authorized by the statute. If this money had not been borrowed, the losses in question must have been paid by assessments on the members, some of whom are the parties now complaining. The corporation did not have at the time the loan was made, nor at any subsequent time, and has not now, any funds with which it could have repaid the bank, except the liability of the members to assessment. Now, can it be said that a co-operative insurance company has been guilty of fraud as against its members by repaying to the bank the money which those members owed, and which they were bound to repay? Surely not. The bank as a creditor, and these appellant members as creditors, do not stand upon the same footing. The bank is not a member of the insurance corporation; it is only a creditor. The complaining members are also, in one sense, creditors of the corporation and in another are its debtors. Suppose we make the bank return the money it has received, it does not thereby cease to be a creditor. Its debt will still remain due. And to what source must it look for repayment? Only to the members of the corporation. It would have a right to at once demand that an assessment be made upon the various members for such pro rata as would produce in the aggregate a sum sufficient to pay its debt. If the first assessment was not sufficient, then another, and still another, would, perhaps, have to be made, until finally, if it was necessary, those very complainants here would be forced to pay back the money they received from the bank. Such circuity of action will not be indulged in. As between themselves, the members occupied the reciprocal relation of debtor and creditor; but as between the bank and them they were all debtors.

Thus far we have considered this case only with reference to the theoretical problem of the corporation's insolvency. As a matter of fact, however, the record shows that at the time it went into liquidation there were outstanding, in round num-

bers, insurance policies of the value of $700,000, every dollar of which was liable to assessment, to the extent of its face value, to pay losses. The statute gives the corporation a first lien upon the property insured for the assessment due. The total indebtedness amounts to about $13,000. It is shown in effecting insurance the principle of insuring for not more than two-thirds of the value of the property was adhered to. We have therefore first liens on nearly $1,000,000 worth of property to pay $13,000. It cannot be that a corporation with such assets and such liabilities can be said to be insolvent.

It may require some trouble and expense to collect the necessary assessments, but we have no doubt that they can be finally collected, and a sum realized sufficient in amount to pay off the comparatively small indebtedness.

The judgment is affirmed.

INSURANCE COMMISSIONER v. PEOPLE'S FIRE INS. CO.

Supreme Court of New Hampshire. Hillsboro. July 27, 1894.
68 N. H. 51.

Effect of Receivership—Agent's Compensation.

Proceedings by the insurance commissioner to wind up the affairs of the People's Fire Insurance Company. On application of the receiver for the advice of the court.

Petition for winding up the defendant's affairs. There was a decree appointing a receiver, and authorizing him to settle up the business of the company. A commissioner was also appointed to pass upon the claims presented. Various questions of law having arisen upon the hearings before the commissioner, he asks the advice of the court. There were outstanding at the time the receiver was appointed a large number of policies which covered the liability of loss by fire for various lengths of time. By the terms of the insurance contract, a policy might be terminated by the insured at his re-

quest, in which case the company agreed to refund to him the unearned premium computed at the customary short rates; or the company might terminate the policy on giving reasonable notice, and paying to the holder a pro rata amount of the premium for the unexpired term of the policy. The company was financially embarrassed for two or three months before the appointment of the receiver, and during this time many policies were written. After the appointment of the receiver, agents of the company caused many policies to be collected from the insured, and the risks to be covered in other companies; but they did not at once return the canceled policies to the receiver, but sent them in together at a later date. In some cases the agents paid to the insured the return premium pro rata, and took an assignment to themselves of the claim. It was a custom of the company in its settlements with agents to allow them the full premium on policies returned, if the insured refused to pay for them, and if they had been in force for three or four months, and had been paid for in previous accounts. This was done as a matter of expediency, and not as a matter of right. The following questions were submitted: (1) Shall policies be treated as canceled when received for that purpose by the agent, or when received by the company or the receiver? (2) Shall policies cancelled after the appointment of the receiver be cancelled pro rata or at short rates? (3) Shall policies be treated as cancelled at the date of the appointment of the receiver, so that claims for return premiums only can be presented thereafter, and from that date? (4) Shall losses since the appointment of the receiver be allowed as claims? (5) Shall full premium, less commission, be allowed on policies in the hands of agents written before the appointment of the receiver, but not paid for, or shall a deduction be made for the time the policies were in force; and, if the latter, shall the deduction be computed pro rata, or at short rates? (6) Shall policies surrendered by the insured before the appointment of the receiver in consequence of reports of the probable insolvency of the company be cancelled pro rata, or at short rates?

Per Curiam.* 1. The insurance contract entered into by

*See footnote, 36 Atl. 607.

the company and each of its policy holders provides that it may be terminated at the request of the insured. It does not require the insured to give the company a previous notice of his election to have the policy terminated. The right to a cancellation upon request, and without limitation, is a material part of the contract. The insured might desire to obtain other insurance at once, and might be prevented from protecting himself in this way, if he could not terminate his contract with this company without giving a previous notice of his intention to do so. In the absence of any stipulation in the contract requiring such notice to be given, the reasonable construction of the insured's contractual right to terminate the policy is that he may do so by delivering it to an agent of the company with a request that it be canceled, or with notice that he surrenders it for cancellation, or with any direct manifestation of his purpose to terminate it at that time. By such action the policy is terminated. Crown Point Iron Co. v. Ætna Ins. Co., 127 N. Y. 608, 614-616, 28 N. E. 653. The appointment of the receiver did not change the right of policy holders to terminate their contracts, or make the manner of its exercise more difficult. Having the right under their policies to surrender them for cancellation before the decree appointing the receiver, they retained it afterwards. The decree did not amount to a repudiation of the legal contracts made by the corporation. Hyde v. Lynde, 4 N. Y. 387, 392; High, Rec. § 204.

2. The question whether the amount to be repaid by the company on the cancellation of a policy is to be pro rata or "short rates" is determined by the contract, as it would have been if receivership proceedings had not been begun. Those proceedings introduced no new element into the contract, and did not deprive a policy holder of his right to be repaid a pro rata part of the premium when his policy was canceled by the company, or to an amount determined on the basis of "short rates" when he surrendered his policy for cancellation.

3. As the insurance contracts were not terminated by the appointment of the receiver, losses happening after his appointment are provable claims against the estate. Whatever may be the relation of policy holders to one another in a mutual insurance company (Commonwealth v. Massachusetts Mut.

Fire Ins. Co., 119 Mass. 45, 51), in a stock company they are not partners. With reference to the company, they are its creditors for the amount of the return premiums that may be due, or for the losses that may have accrued under their policies. People v. Security Life Insurance & Annuity Co., 78 N. Y. 114, 122, 129. The objection that in this view of the rights of the policy holders no distribution of the assets can be made until all existing policies have expired, does not seem to be important, since the receiver, representing the company, may terminate all policies upon notice, as provided in the contract.

4. The rights of agents of the company to compensation are to be determined according to the contracts, express or implied, under which they were employed. The course of business adopted by the company in its dealings with the agents may be competent evidence upon that question. The mere fact that the company, as a matter of expediency, has been accustomed, under some circumstances, to allow them the full premiums on policies returned, which had been paid for in previous accounts, does not enable the court to find as a matter of law that all the agents were or were not to be credited with the premiums they voluntarily advanced. The question presented is one of fact, which evidently may be determined differently in different cases, according to their varying circumstances.

5. The motive that has induced policy holders to terminate their contracts is immaterial. The substance of the policies on this point as stated in the case, is that the company could terminate the contracts "on giving reasonable notice, and paying a pro rata amount," and that the insured could terminate them by request. The insolvency of the company, or a fear of its insolvency, or the appointment of a receiver, might be a reason which the insured would consider sufficient to act upon in exercising their right of terminating the contracts. But they could terminate them without any reason. The insolvency or financial embarrassment of the company, operating as a moral compulsion upon the insured, and forcing them to surrender their policies for the protection of their interests, would not alter the fact that the contracts were terminated by them, and not by the company. Case discharged.

TREAT v. PENNSYLVANIA MUT. LIFE INS. CO.

Supreme Court of Pennsylvania. May 19, 1902. 203 Pa. St. 21.

Receivers—Appointment at Suit of Stockholder.

Suit by Frederick H. Treat, a stockholder, against the Pennsylvania Mutual Life Insurance Company, to obtain a receiver. Receiver was appointed, and defendant appeals. Affirmed.

The following is the opinion of the court below (Arnold, P. J.):

"Upon a careful examination and consideration of the evidence taken in this case, we are unanimously of the opinion that the Pennsylvania Mutual Life Insurance Company has abandoned the purposes for which it was chartered, and has gone out of business, and that a receiver should be appointed in accordance with the prayer of the bill. Without condemning its managers for willful and secret fraud, we find that they have been guilty of such mismanagement as amounts to legal fraud in voting themselves such large salaries as $10,000 a year for the president, and $5,000 each for the treasurer and secretary a year, when the entire receipts of the company were only $15.30, being the annual premium on one policy of the company outstanding. Not only that, but the managers voted the president, John M. Doyle, and treasurer, William P. Elder, back pay, and gave them judgment notes of the company which were afterwards used to satisfy two mortgages, which were given by Doyle and Elder as security for their subscription to the guaranty fund of the company. The trial judge has shown that these back payments, after the services were rendered, were illegal. John M. Doyle, William P. Elder, and Joseph A. Conroy were the active parties in purchasing the charter from the original company, the Reverting Fund Assurance Association of Berks County. Doyle and Elder agreed to subscribe $50,000, and Conroy, who was an insurance man, testified that he was to have a third interest for his experience. Doyle and Elder gave two mortgages, one for $20,000 and the other for $10,000 to secure part of their subscription. They

were to receive 3 per cent interest on their mortgages; but as no interest was paid them, they satisfied the mortgages and put back into the company their certificates for the shares of stock held by them. This was, in effect, distribution of the assets of the company between themselves as shareholders, and was clearly illegal. Being so advised by counsel, they restored the mortgages and took back their certificates. They then resorted to the plan of paying themselves enormous salaries and back pay, and issued judgment notes of the company which they used in payment of the mortgages, which were then satisfied a second time. All this was clearly illegal. This was due on November 17, 1897. A year and a half prior thereto, to wit, on May 6, 1896, the company reinsured its risks in the Iowa Life Insurance Company, and during the years of 1896 and 1897, and since, as before said, has been practically out of business, having no income except the premium of $15.30 on a policy for $1,000 outstanding. An examination of the reports of the company shows the dwindling of its assets. On December 31, 1895, the company reported to the insurance commissioner a total of net invested assets of $86,297.88, and certificates of insurance in force $1,768,536. Report for 1896 has not been printed in full. Reference is made to it in the report of 1897 in these words: 'Amount of net ledger assets December 31 of previous year, $46,855.74; total income for the year $15.30.' Among the disbursements we find salaries of officers $26,953.19. These were the salaries authorized by the back-pay resolution of November 17, 1897. The result was that the balance of the assets on December 31, 1897, was $17,485.57. On December 31, 1898, the balance to protect contracts was $9,062.23, and December 31, 1899, this balance was reduced to $6,157.63. Thus we see that the assets on December 31, 1895, of $86,297.88, were on December 31, 1897, reduced to $17,485.57, and in 1899 to $6,157.63, while the total income of the company for each of these years was only $15.30, as against a reported income for 1895 of $94,286.42. As before said, the company reinsured its risks on May 6, 1896, and since that time has been practically out of business. It has no office, solicits no risks, and is practically defunct. Under these circumstances, we are of the opinion

that a receiver should be appointed to take charge of the remaining assets of the company and to recover any amounts which may be due to it. The effect of appointing a receiver in a case of this kind will undoubtedly be to work a dissolution of the company unless something is done to revive it. Authority to appoint a receiver at the suit of a stockholder against a corporation which may be solvent, when the corporation officers, by mismanagement or fraud, are jeopardizing the property, may be found in the case of Cowen v. Plate Glass Co., 184 Pa. 1, 38 Atl. 1075. It was contended by the defendant that the plaintiff should have requested the managers of the company to apply for a receiver before filing his bill. In some cases that may be so, but here the receiver will be required to proceed against some of the managers of the company to recover the amounts they may have illegally taken out of the treasury, and in such cases it is not necessary to ask them to apply for a receiver to sue themselves. 'The authorities are agreed that, if it sufficiently appears that a demand would be useless, it need not be made.' Per Mitchell, J., in Wolf v. Railroad Co. (1900) 195 Pa. 91, 45 Atl. 936. A receiver will be appointed as prayed for."

Per Curiam. The appointment of a receiver is affirmed on the opinion of Judge Arnold.

Accord. Ins. Co. v. People 68 N. H. 51, 44 Alt. 82; Yeates v. Continental Life Ins. Co. 207 Ill. 512, 69 N. E. 779; Yates v. People 207 Ill. 316, 69 N. E. 775.

See Streit v. Citizens Fire Ins. Co. 29 N. G. Eq. 21.

Northern counties of England Fire Ins. Co. 17 Ch. D. 137, 50 L. G. Ch. 273.

It has been held that all policies terminate when Co. assigns for the benefit of creditors Smith v. National Credit Ins. Co. 65 Minn. 283, 68 N. W. 28, 33 L. R. A. 511.

MONUMENTAL MUT. LIFE INS. CO. v. WILKINSON, INS. COM'R.

Court of Appeals Maryland, 1904. 100 Md. 31.

Liquidation and Receivership.

Schmucker, J. The appeal in this case was taken from two orders of circuit court No. 2 of Baltimore City, the first of which appointed receivers of the assets of the defendant corporation, and the second refused to rescind their appointment. No appeal lies from the order refusing to rescind the appointment, because it is not final in its nature (Hull v. Caughy, 66 Md. 104, 6 Atl. 591); but, as section 25 of article 5 of the Code authorizes an appeal from an order appointing receivers, we will consider the propriety of the passage of the order appointing them in the present case.

The bill professes to have been filed under the authority conferred by subsection 7 of section 122 of article 23 of the Code as re-enacted by chapter 338, p. 453, of the Acts of 1902. It is unnecessary to here insert that subsection at length. It is sufficient to say that it embodies three provisions relating to the powers and duties of the Insurance Commissioner relevant to the present controversy, which, stated in their reverse order, are: (1) The commissioner is empowered to institute through the Attorney General, or such attorney as he may select, suits and prosecutions for any violation of the provisions of the insurance laws of the state. (2) He is directed to institute appropriate proceedings according to law for the liquidation of the affairs of any insurance company of this state which shall "appear to him upon examination" to be insolvent or fraudulently conducted. (3) He is also directed, whenever he has reason to believe that any insurance company is insolvent or fraudulently conducted, to make complaint thereof to a judge of the circuit court where the company or its agent is located, and it is then made the duty of the judge to appoint a commission to examine into the company's affairs, and, if their report sustains the allegations of the complaint, to at once close by injunction the affairs of the company. Other portions of

section 122 authorize the commissioner to make examination, either in person or by his agents, of insurance companies, and require him "once at least during his term of office" to thoroughly examine every such company organized under the laws of this state. The substantial facts which called for the application of the provisions of this law to the present case are as follows: The appellee, the Insurance Commissioner of Maryland, filed the bill in circuit court No. 2 of Baltimore City on October 10, 1903, through counsel selected by the Attorney General, alleging that the appellant was a life insurance company incorporated under the general laws of this state for the purpose of insuring lives on the annual, endowment, or any other plan, and that it had deposited $100,000 in securities with the State Treasurer, according to law, in order to entitle it to issue insurance policies; that it had on October 19, 1900, taken over the insurance business and assets of the Order of the Iron Hall of Baltimore City, and had since then been conducting a life insurance business, many of the details of which are mentioned in the bill, but need not be noticed here. The commissioner then alleged in the bill that, having been informed by his official actuary that the defendant's liabilities were grossly in excess of its total resources, he felt it to be his duty to make complaint thereof to the court, in accordance with the provisions of subsection 7 of section 122 of article 23 of the Code. He further averred in the bill that from his own investigation into the affairs of the defendant it appeared that it was conducting business upon an impracticable plan, that it had transcended the powers conferred on it by its charter, and that it was insolvent. The prayer of the bill is for the appointment of a commissioner under subsection 7 of section 122 to thoroughly examine the condition of the defendant, and, if the charges of insolvency and abuse made in the bill should be sustained by the report of the commissioners, that the defendant's business might be restrained by injunction, and a receiver of its assets appointed, and its affairs liquidated and wound up. A copy of the defendant's certificate of incorporation and of its by-laws exhibiting its plan or scheme of operations, and also a copy of the actuary's report to the commissioner of the result of his examination into its condition, appear among the exhibits filed with the bill.

The defendant answered the bill on October 16, 1903, insisting that it was an assessment company, and not an ordinary life insurance company, and denying that it was insolvent, or had transcended its corporate powers. The answer also sets up the fact that on the 29th of May previous, being threatened with these proceedings by the Insurance Commissioner, the defendant had filed a bill in the same court for an injunction to restrain him from instituting them, and that he had demurred to the bill, and that the demurrer had been set for hearing, but had not been heard at the time of the filing of the present bill. The answer further avers that the defendant had, prior to the filing of the bill in this case, assigned all of its assets to the I. O. O. F. Mutual Insurance Company of Philadelphia, which assumed all of the defendant's obligations.

On March 4, 1904, the circuit court appointed commissioners in accordance with the provisions of the statute to examine into the condition of the defendant. They made the examination and filed their report in the case, showing the defendant to be insolvent, whereupon the court on April 4, 1904, appointed receivers to take possession of its assets, and hold them subject to the further order of the court. On April 16, 1904, the defendant by new counsel filed a petition in the case asking for the rescission of the order appointing the receivers. Four days thereafter the court filed an opinion and an order dismissing the petition of the defendant, without prejudice to it to take such action as it might think proper, by exceptions or otherwise, to the report of the commissioners already mentioned. It does not directly appear from the proceedings in the record what disposition was made of the bill set up in the answer as having been theretofore filed in the same court by the defendant for an injunction to prevent the plaintiff from instituting or maintaining the present suit, nor does it appear whether the defendant was heard upon the appointment of the receivers after the coming in of the commissioner's report. It is stated, however, in the opinion filed by the learned judge below, that after the filing of the answer in the present case no further proceedings were had therein until after the trial of the prior case of the defendant against the Insurance Commissioner upon the demurrer to the bill, at

which the court, after a full agreement, decided in an oral opinion that the defendant was an old line or level premium insurance company, and was not an assessment company, and sustained the demurrer to the bill; and that thereupon, after taking a day or two for reflection, the counsel for the defendant took no appeal from the decision in that case, but informed the court that he was instructed by his client to say that no further objection would be made to the appointment of the commission under the act of 1902, or to the appointment of a receiver. It is further stated in said opinion that on March 4, 1904, at the appointment in this case of the receivers, the defendant not only made no objection to their appointment, but through its then counsel asked for and received representation in the receivership, and that the persons who were appointed receivers were agreed upon by the counsel for the respective parties to the suit.

It appearing upon the face of the proceedings that this suit was brought under and in conformity with the provisions of subsection 7 of section 122 of article 23, and that it has been conducted in substantial compliance therewith, it follows that the circuit court had jurisdiction to entertain it; and, it further appearing that the order appointing the receivers was passed under such circumstances that it was to all intents and purposes passed by consent of the defendant, it is bound thereby, and cannot be heard to contest the validity of the order on appeal.

Furthermore, no order or decree for the liquidation of the affairs of the defendant, or for any final disposition of the case, has yet been passed. The order appealed from simply directs the receivers to take possession of the assets, and hold them subject to the further order of the court. There is no force in the contention urgently advanced by the defendant that subsection 7 was unconstitutional, because it authorized an insurance company to be deprived of its property without due process of law. It is clearly within the power of the state to fix by statute the terms upon which corporations created under its general laws shall be permitted to continue to transact business. The order appealed from will be affirmed.

Order affirmed, with costs.

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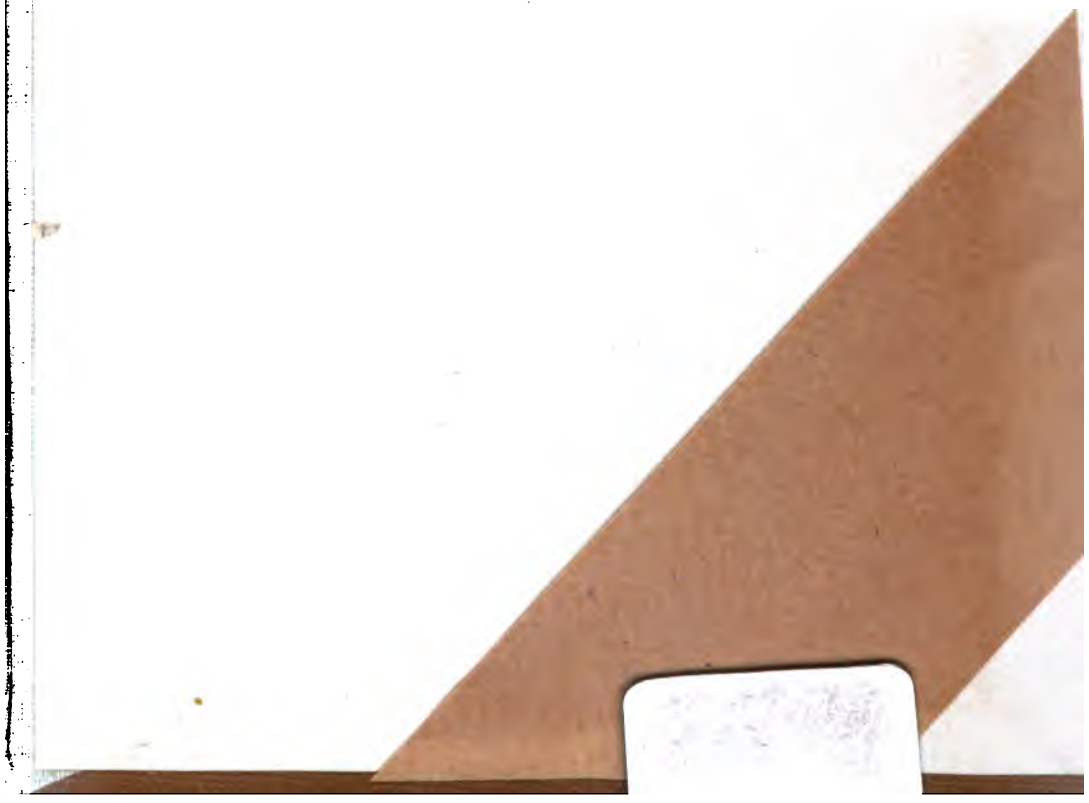
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